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No.

IN THE

Supreme Court of the United States

DR. KIRSTEN KNUDSEN, CHRIS BAKER AND VIKKI BAKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

v.

LIBERTY MUTUAL INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state court order certifying an amended class of plaintiffs the "commencement" of a new action under the Class Action Fairness Act of 2005 ("CAFA") for purposes of allowing a defendant to remove the case to federal court where the state court class action was begun in 2000, CAFA does not apply to any civil action commenced before February 18, 2005, and this Court's decisions make clear that members of a class can be determined at any time subsequent to the filing of the complaint without risking the "commencement" of new litigation?

2. Did the court of appeals ignore Congress' intent in enacting CAFA by holding that because an amended class certification could subject the respondent to more liability than when the complaint was first filed, it is the "commencement" of fresh litigation under CAFA entitling the respondent to remove the action to federal court?

3. Where respondent's deliberate and fraudulent 5-year "shell game" in state court to avoid disclosing its true identity as a party has been so evasive and obfuscatory that no discovery ever took place and that ultimately contempt and default judgments were entered against it, should it now—even though still in contempt of state court discovery orders---be entitled to remove the action to federal court under CAFA where the federal district court now must give no weight at all to the state court's default judgment or the respondent's contumacious conduct which justified it?

4. Are public policies, notions of comity and a pragmatic federalism undermined by the decision below which

usurps a state court's power to enforce its own judgments and rewards a recalcitrant and contumacious defendant with a federal forum where it can shed the default judgment entered against it in state court and renew its fraudulent "shell game" concerning its true identity?

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The published opinion of the United States Court of Appeals for the Seventh Circuit in *Kirsten Knudsen, Chris Baker and Vikki Baker v. Liberty Mutual Insurance Company* (C.A. No. 05-8037),decided January 27, 2006, and reported at 435 F. 3d 755(7th Cir.2006)("*Knudsen II*"), granting the petition for leave to appeal and vacating the District Court's order remanding the case to state court, is set forth in the Appendix hereto(App. 1-8).

The published opinion of the United States Court of Appeals for the Seventh Circuit in *Kirsten Knudsen, Chris Baker and Vikki Baker v. Liberty Mutual Insurance Company* (C.A. No. 05-8010),decided June 7, 2005, and reported at 411 F. 3d 805(7th Cir.2005)("*Knudsen I*"), denying the petition for leave to appeal thereby affirming the District Court's order remanding the case to state court, is set forth in the Appendix hereto(App. 9-14)

The unpublished Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division, in *Dr. Kirsten Knudsen, P.C. and Chris Baker and Vikki Baker v. Liberty Mutual Insurance Company*,(Civil Action No. 05-C-5924), decided December 13, 2005, granting the petitioners' motion to remand the case to state court for lack of federal jurisdiction, is set forth in the Appendix hereto(App. 15-26).

The unpublished order of the United States Court of Appeals for the Seventh Circuit in *Kirsten Knudsen, Chris Baker and Vikki Baker v. Liberty*

Mutual Insurance Company(C.A. No. 05-8037), decided February 22, 2006, denying the petitioners' timely filed petition for rehearing and rehearing *en banc*, is set forth in the Appendix hereto(App. 27-28).

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit granting the petition for leave to appeal and vacating the District Court's order remanding the case to state court, was entered on January 27, 2006; and its order denying the petitioner's timely filed petition for rehearing was filed on decided on February 22, 2006(App.1;27).

This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of the petitioner's timely filed petition for rehearing and rehearing *en banc*. 28 U.S.C. Section 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

RELEVANT PROVISIONS INVOLVED(see Appendix)

STATEMENT

On March 13, 2000, the petitioner Dr. Kirsten Knudsen, P.C., on behalf of herself and all other persons and entities similarly situated("the petitioners"), brought this national civil class action complaint against the respondent Liberty Mutual Insurance Company("Liberty"), a Massachusetts corporation, in the Chancery Division of the Circuit Court of Cook

County in Chicago, Illinois. The thrust of the petitioners' complaint was that Liberty employs a computerized cost containment program using a database which systematically and wrongly reduces its payment of medical bills submitted for reimbursement either by Liberty's insureds or by health care providers who have treated Liberty's insureds.

Dr. Knudsen's claim is typical of the class. Her patient stated that his medical expenses were being handled by Liberty and he gave her Liberty's phone number in Schaumburg, Illinois. Dr. Knudsen called the number and spoke to Liberty's adjuster who verified coverage, the patient's claim and claim number and then told her where to send her bills. After Dr. Knudsen treated the patient and billed Liberty for the care she rendered, the sum she eventually received was unilaterally reduced by Liberty and it refused to pay the full amount billed even though Dr. Knudsen's charges were customary for similar medical treatment within the same geographic area.

Asserting that Liberty's use of this database is a breach of contract and violation of the Illinois consumer fraud statutes as well as analogous statutory schemes in other states where Liberty does business, the petitioners sought class certification and the award of damages to both the named plaintiff and the putative class of plaintiffs for the medical expenses Liberty wrongly refused to pay "for a period of ten years prior to the date of filing of this complaint to present." In an amended complaint filed on March 15, 2001, the petitioners refined their claims, added a third count seeking declaratory relief and continued to identify as actionable Liberty's use of a computer database which

systematically applied inaccurate fee schedules to reduce its payout of medical bills for its insureds regardless of what line of Liberty's business generated these medical bills or what policy of Liberty was involved.

The amended complaint further defined the class to be certified as

> all LIBERTY insureds, their third party beneficiaries and their assignees who are entitled to payment of medical bills under any medical payments coverages pursuant to a LIBERTY insurance policy, and who have received a payment from LIBERTY for less than the medical charge, based upon the application of LIBERTY'S medical cost and utilization database.

The petitioners' amended complaint defining this class and the actionable conduct for which they sought redress was *not* directed to any specific subsidiary company of Liberty. Instead, they alleged generally that "*Liberty* has knowingly and intentionally engaged in such practices for the purpose of reducing *its* overall claims ratio and payments expenditures" and that "*Liberty's* medical claims database is designed solely to reduce the level of medical benefit reimbursement."

The petitioners adopted this open-ended description of the respondent Liberty because they knew from their examination of Liberty's required annual filings with the Departments of Insurance in states where it does business that Liberty files one such statement with those departments on behalf of all of its operating subsidiaries and one federal income tax

return for all of its companies; its board of directors make all investment decisions for all of its subsidiary companies; and almost all of the employees of Liberty's subsidiaries are also employees of the parent Liberty. Even Liberty's counsel conceded during one oral argument that "a separate company" houses all of Liberty's subsidiaries. The petitioners' attorneys accordingly looked forward to discovery in state court in order to identify Liberty Mutual Insurance Company (or some other entity) as (1) the parent holding company of all of Liberty's subsidiaries;(2) the entity which controls all corporate policies for the shell subsidiaries; and therefore (3) the appropriate class defendant who employs the offending computer database to deny full payment of medical claims for Liberty's insureds and those of its shell subsidiaries.

In appearing and answering the petitioners' complaint and amended complaint, Liberty never claimed that it was wrongly sued or that it was an improper party; and it *never once* in its answers, affirmative defenses or other pleadings denied the petitioners' individual allegations that it was the party responsible for denying full payment of Dr. Knudsen's bill for her medical services or their class allegations that it denied full payment of medical bills for other beneficiaries of Liberty policies issued by its subsidiaries.

However, the petitioners' discovery in state court as to their class allegations as well as to the merits of their complaint proved chimerical. Even though they issued multiple interrogatories and requests for production of documents upon Liberty seeking to identify the dimensions of Liberty's

responsibility for its use of the offending computer database to deny full payment of medical claims for Liberty's insureds and for those of its shell subsidiaries or companies, Liberty repeatedly failed to respond in any respect, refusals which prompted numerous motions to compel by the petitioners and which eventually resulted in a finding of contempt against Liberty for its repeated and obstinate failure to provide discovery.

After some parties-plaintiffs (Chris and Vikki Baker) from another national civil class action in the State of Washington alleging identical claims were allowed to intervene as additional class representatives and more than three years after this lawsuit was brought with no discovery having taken place because of Liberty's failure to respond to any of the petitioners' discovery requests, Liberty moved to dismiss the petitioners' complaint on August 13, 2003. It asserted that the insurance policies giving rise to their claims were not issued by Liberty Mutual Insurance Company as alleged "but by an entirely separate corporation, Liberty Mutual *Fire* Insurance Company("Liberty Fire")." It therefore claimed that the court lacked subject jurisdiction since Liberty Fire, a separate and distinct company, had not been named as a party to this action, had not been served and had not entered an appearance.

The petitioners opposed Liberty's motion arguing *inter alia* that the motion judge should not even entertain Liberty's motion since their own pending motions for sanctions and the entry of default judgment against Liberty for discovery abuses take precedence; that Liberty waived its right to claim that

it was an incorrect defendant by answering the complaints as the correct defendant and then by obstinately refusing to provide discovery on this very question; and that its continuing contumacious conduct in refusing to provide discovery deprived it of the right to be heard on its motion.

On March 26, 2004, the Circuit Court for Cook County, Nowicki, J., issued a memorandum order and opinion denying Liberty's motion to dismiss, entering a default judgment against it for its repeated discovery abuses and striking its answer and affirmative defenses. *Knudsen v. Liberty Mutual Insurance Company*, 2004 WL 625679(Ill.Cir.2004). She found that Liberty made knowing, deliberate and bad faith misrepresentations in its pleadings concerning its standing as the correct defendant in this suit, stalled the petitioners' discovery in order to have the statute of limitations run on the petitioners' claim against the nominally "correct" defendant and then moved to dismiss for lack of "standing" once it became clear that discovery sanctions against it were imminent. As Judge Nowicki concluded, Liberty refused to comply *with at least six* of the Court's orders requiring it to provide responses to the petitioners' discovery requests. She found that

> [w]ith the passage of each successive year, this Court has become increasingly shocked by Liberty's casual attitude towards its discovery abuses and this Court's authority....The egregious behavior demonstrated by Liberty is sufficient to impose a default as an appropriate sanction against Liberty.

> ....What has occurred in this matter is that Liberty's actions in stringing out its discovery compliance have allowed [it] to effectively lay in wait until the statute of limitations has run on what it considers to be the appropriate defendant in the matter. It was not until [discovery] sanctions appeared imminent that Liberty decided to defend on the basis of standing, an issue that it has kept well hidden by its false pleadings. These conclusions by the Court as to Liberty's intent are substantiated by the fact that Liberty has never filed an affirmative defense as to standing in the four years this case has been proceeding, nor the simplest of motions for summary judgment pointing out that the [petitioners] have not named the correct defendant. Given the intent behind Liberty's abuses and violations, this Court finds that Liberty has demonstrated a deliberate disregard for this Court's authority.

Id. at 2004 WL 625683.

In the wake of this ruling, the petitioners moved for an order from the Circuit Court of Cook County that this civil action satisfied the prerequisites of a class action under Illinois law and certifying the class of plaintiffs to be

> [a]ll LIBERTY MUTUAL INSURANCE COMPANY and *LIBERTY FIRE INSURANCE COMPANY* insureds, their third party beneficiaries and their assignees who submitted medical bills under any medical payments coverages pursuant to a Liberty

> Mutual or Liberty Fire insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

However, twelve days before the hearing in state court on the petitioners' class certification motion scheduled for April 11, 2005, and in order to shed itself of the default judgment which had entered against it because of its pervasive discovery abuses, Liberty removed the case to the federal district court relying upon the provisions of the Class Action Fairness Act of 2005("CAFA"), 28 U.S.C. Sections 1332(d) and 1453, contending that this new class certification amounted to "commencing" a new action, entitling it to removal under CAFA.

The Federal District Court for the Northern District of Illinois, Eastern Division, Castillo, J., promptly sent it back to the Illinois state courts, granting the petitioners' motion to remand the matter, stating in open court that the amendment of the class definition entertained by the state courts did not amount to the "commencement" of a new action; that the "new" class definition was completely consistent with the class which had been proposed throughout the litigation; and that "the only one that's trying to create federal jurisdiction in this case is some creative lawyers on the part of [Liberty]."

The Court of Appeals for the Seventh Circuit denied Liberty's petition to appeal and affirmed Judge Castillo's ruling. *Kirsten Knudsen, Chris Baker and Vikki Baker v. Liberty Mutual Insurance Company*, 411 F. 3d 805(7th Cir. 2005)("*Knudsen I*")(App. 9-14).

The court, speaking through Circuit Judge Easterbrook, agreed with the Tenth Circuit Court of Appeals in *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232(2005), that Section 9 of CAFA means what it says, that CAFA applies only to suits "commenced on or after the date of enactment of this Act," i.e., February 18, 2005(App. 10). Since the petitioners' civil action against Liberty was begun in state court in March of 2000, it was commenced before CAFA's enactment and could not be removed under its provisions(*Id.*).

The court rejected Liberty's argument that any "substantial" or "significant" change in the petitioners' class definition "commences" a new case, stating that a host of significant changes in a plaintiff's claim occur all the time in the course of litigation without them beginning a "new" claim; and it rightly noted that a doctrine of "significant" or "substantial" change is too imprecise a concept to use in implementing a jurisdictional rule like the one embodied in Section 9 of CAFA (*Id.* at 11).

However, Judge Easterbrook further observed that

> "a new claim for relief (a new 'cause of action' in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes could well commence a new piece of litigation for federal purposes even it bears an old docket number for state purposes"(*Id.* at 12).

He thought the decisional law under Fed. R. Civ. P. 15(c), for when a claim relates back to the original

complaint, would provide guidance for when a court should treat a claim as sufficiently independent to be treated as "fresh litigation"(*Id.*). Since the change in class definition here neither presented a novel claim for relief nor added a new party, Liberty was not entitled to remove the case to federal court under CAFA(*Id.*).

The court went further and measured the petitioners' proposed revised class in state court which included "all Liberty Mutual Insurance Company and *Liberty Fire Insurance Company* insureds"(*Id.* at 12-13). Ignoring entirely Liberty's five-year discovery abuses in failing to provide the petitioners with the names of all of its subsidiaries and its relationship with them, its continuing contempt of state court discovery orders which were aimed at identifying Liberty's relationship with its subsidiaries and the default judgment which had been entered against it as a result, Judge Easterbrook thought it an odd revision: not only was the name of Liberty Mutual Fire Insurance Company incomplete in the class definition (due to a scrivener's error) but also the entity known as Liberty Mutual Fire Insurance Company was not a party to the suit(*Id.* at 13).

Since the petitioners had not alleged that Liberty and Liberty Fire were alter egos with two names for just one business, making a change in the class definition unnecessary, Judge Easterbrook concluded that Liberty Fire must be a separate, distinct party and suggested that removal under CAFA might be appropriate if Liberty Mutual Fire Insurance Company should be added as a defendant(*Id.* at 13-14). In that event, Liberty Fire "could enjoy a right to remove under [CAFA], for suit *against it* would have

been commenced after February 18, 2005...But Liberty Mutual Insurance Company cannot remove five years after this suit was commenced just because a non-party corporate sibling has been mentioned in [the petitioners'] latest papers"(*Id.* at 14).

With the matter remanded to the Circuit Court for Cook County and the default judgment against Liberty fully in place as a result of its earlier discovery abuses, a hearing was held before Judge Nowicki in July of 2005 on the petitioners' motion to amend the proposed national class definition so that it included

> all insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries (collectively "Liberty Mutual"), their third party beneficiaries and their assignees who submitted medical bills covered by a Liberty Mutual insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

On September 29, 2005, the Circuit Court issued a memorandum and order granting the petitioners' motion for this class certification. It identified the petitioners' core claim against Liberty since the beginning of this lawsuit as its nationwide use of a computerized cost containment program which systematically and arbitrarily reduces its payment of medical bills submitted for reimbursement by Liberty's insureds or by health care providers who have treated Liberty's insureds. Since Liberty allegedly resorts to this computer program not on any individualized basis but rather systematically whenever it reimburses for

medical bills, the court concluded that there were common questions of fact and law which predominate over any individual questions of the class members.

As to whether the petitioners would adequately represent the class since each of them claims a right to medical payment under a policy issued by Liberty *Fire* rather than Liberty, the Circuit Court first noted that in order to address this argument, the petitioners submitted an amended class definition which encompasses all of Liberty's insureds as well as the insureds of its affiliates and subsidiaries. Addressing Liberty's further argument that its affiliates and subsidiaries were never given fair notice of these allegations and that the default judgment already rendered against it cannot serve as the basis for certifying the class here, Judge Nowicki referred to the unique fact of this litigation: Liberty's refusal for over five years to provide discovery and to delay----*even up to the present time*—to identify the "true defendant in this matter" has led to a "shell game" where no entity, including Liberty, took responsibility for the offending conduct; and it warranted the default judgment which now prevents Liberty from contending that its affiliates and subsidiaries were not implicated in its scheme.

In fact, because of Liberty's failure to respond to any of the petitioners' written discovery, and after more than five years since their suit was filed, the petitioners have been unable to conduct a single deposition of an employee of Liberty Mutual Insurance Group, Liberty Mutual Insurance Company or any Liberty subsidiary in order to identify the dimensions of Liberty's responsibility for its use of the offending computer database to deny full payment of medical

claims for Liberty's insureds or for the insureds of its subsidiaries. Thus the petitioners have *never* been in a position to demonstrate factually that Liberty Mutual Insurance Company, as a holding company for its shell subsidiaries including Liberty Fire, is the entity which controls all corporate policies for those shell subsidiaries, policies which include the use of a distorted, unfair computer database to deny full payment of medical claims for the insureds of Liberty and its shell subsidiaries.

According to the Circuit Court, the default caused by Liberty's gamesmanship in discovery and its refusal to identify the extent of its relationship with its affiliates and subsidiaries justified the petitioners attempting to recover from Liberty itself on behalf of its affiliates and subsidiaries. Since Liberty's affiliates and subsidiaries will not be required to pay any judgment, their constitutional right to adequate notice was not impaired. Moreover, Liberty and its affiliates filed *one* income tax return; *one* board of directors makes investment decisions for *all* the companies; and Liberty provides the office space, the employees and the adjusting for *all* of its affiliates and subsidiaries. Indeed, Liberty and its affiliates *act as one company*. Even Liberty's counsel uncharacteristically conceded during one oral argument that "a separate company" houses all of Liberty's subsidiaries.

Judge Nowicki concluded:

> Therefore, in line with this Court's prior Opinion finding Liberty in default, this Court will not allow Liberty to use its improper conduct as a means of defeating [petitioners'] class action

> claim against what Liberty states is the wrong defendant and finds that [petitioners] amended class definition is sufficient and encompasses [petitioners] as adequate class representatives. To find otherwise would render this Court's default against Liberty meaningless.

Following up on this ruling, the Circuit Court, on October 14, 2005, entered an order setting up a schedule for completing discovery on the issue of damages and costs due from Liberty on the petitioners' claims.

On the same day, October 14, 2005, Liberty removed this case once again to the Federal District Court for the Northern District of Illinois, Eastern Division, pursuant to CAFA contending that Judge Nowicki's order of September 29, 2005, certifying the petitioners' amended class had "commenced" a new action by adding new claims and alleging new conduct against Liberty and its subsidiaries and affiliates which do not "relate back" to their original complaint filed in March of 2000. Succinctly, Liberty argued that the new claims added by the September 29th order "involve policies, databases, and witnesses going back ten additional years: from 1994, when Liberty first started using a medical cost and utilization database to adjust claims under its own policies, to the mid 1980s, when at least two of Liberty's affiliates started using such databases...[and] [n]othing in the original complaint or the amended complaint told Liberty that it would be required to defend such claims."

The petitioners moved to remand the case to state court. They contended that a change in class

certification did not "commence" a new action for purposes of CAFA, as enacted by Congress; that no new defendant was added to this suit; that no new claims were added; that CAFA does not apply in any event since the amended certified class "still pertains to claims arising out of Liberty's use of biased, pre-pricing software;" and that the need to add Liberty affiliates and subsidiaries to the class definitions stems directly from Liberty's established discovery abuses. As the petitioners argued, the change in the scope of the class definition arises directly from Liberty's prior discovery violations and the state court's default order; and Judge Nowicki's order of September 29, 2005, certifying the class did not commence any new claims but rather defined the scope of claimants who could recover on these pre-existing claims, given Liberty's obstinate refusal for over five years to identify "the true defendant" in this case and the dimensions of its and its affiliates' responsibility for using their biased computer database.

On December 13, 2005, the District Court, Castillo, J., granted the petitioners' motion to remand the matter to state court(App. 15-26). He ruled that the change in class certification from all insureds of Liberty Mutual Insurance Company to all insureds of Liberty, its affiliates and subsidiaries relates back to the original complaint and while the amendment invokes different, additional policies than originally alleged, it does not cause such greater amount of legal research and discovery that it commences new litigation(*Id.* at 19-20). Nor does removal to federal court lie even if it creates new legal theories of liability(*Id.* at 20-21). In addition, while the amended class of plaintiffs may cause liability to reach farther back in time than

Liberty envisioned under the original complaint, that fact alone is not enough to create new litigation since the suit still involved the same claim alleged in the original complaint, i.e., the unfair, unauthorized use by Liberty of a biased database to diminish reimbursement of medical expenses for insureds of Liberty, its affiliates and subsidiaries(*Id.* at 22-23).

Finally, the district judge rejected Liberty's claims that the amended class definition implicates ERISA claims thereby justifying removal under either CAFA or the federal preemption doctrine(*Id.* at 23-24). Referring to Judge Nowicki's decision of September 29, 2005, Judge Castillo determined that the claims of the new class would include only insureds of property and casualty policies, *not* those who are insured by group health insurance policies(*Id.* at 24). As he concluded in remanding the case to state court, "[t]his is not an attempt at 'artful pleading' by [petitioners] to avoid a federal claim; rather it is a creative attempt by Liberty to find another way into federal court" (*Id.*).

Without full briefing or oral argument, the court of appeals granted Liberty's petition to appeal and reversed Judge Castillo's ruling. *Kirsten Knudsen, Chris Baker and Vikki Baker v. Liberty Mutual Insurance Company*, 435 F. 3d 755(7th Cir.2006)("*Knudsen II*")(App.1-8). Minimizing Liberty's deliberate, five-year refusal in state court discovery to provide the identity of the true defendant in this case as merely "arguable error" and sanitizing Liberty's conduct (which justified its default in state court) as simply "not doing enough in discovery," the court speaking again through Judge Easterbrook ruled that the amended class certification imports new claims into

this proceeding which commences new litigation for purposes of CAFA(*Id.* at 5-7).

Relying upon Liberty's self-serving characterizations of the state court proceedings and its other post-removal submissions in federal court at odds with its conduct in state court, Judge Easterbrook found as a fact that the amended class definition now includes insureds of some of Liberty's affiliates *whose claims Liberty did not adjust*, e.g., Liberty Northwest Corporation and Employers Insurance of Wausau(*Id.* at 6-7). This was enough for him to conclude that new claims had been commenced within CAFA's coverage period justifying Liberty's removal(*Id.* at 7).

The court of appeals accordingly vacated Judge Castillo's order, revoked the remand and ordered the district court to decide the case on its merits without regard either to the state judge's order of default (or contempt) against Liberty or the scope of the class certification which she had approved(*Id.* at 7-8).

On February 22, 2006, the Court of Appeals denied the petitioner's timely filed petition for rehearing and rehearing *en banc*(App. 27-28).

REASONS FOR GRANTING THE PETITION

1. Amending The Class Entitled To Pursue A Class Action Begun In State Court Before CAFA Was Enacted Due To The Defendant's 5-Year Refusal To Disclose The True Defendant In This Case Does Not "Commence" A New Action Which The Defendant Can Remove To Federal Court Under CAFA And To Rule Otherwise Undermines Congress' Intent In Enacting This Legislation And Overrules This Court's Decisions Recognizing The Right Of Class Members To Redefine Themselves Without The Risk Of "Commencing" New Litigation.

In this class action begun in the Illinois state courts in March of 2000, Liberty made knowing, deliberate and bad faith misrepresentations in its pleadings concerning its standing as the correct defendant; it has stalled the petitioners' legitimate discovery at every turn so that the statute of limitations could run against the nominally "correct" defendant; and it has moved to dismiss for lack of "standing" when it became clear that discovery sanctions against it were imminent. Liberty has refused to comply *with at least six* of the state court's orders requiring it to provide responses to the petitioners' discovery requests over a five-year span. This egregious behavior earned it a default judgment and the striking of its answer and affirmative defenses. *Liberty is still in contempt of the Circuit Court's discovery orders* and it has demonstrated a deliberate, continuing disregard for the state courts' authority in this litigation.

In the face of Liberty's refusal to disclose the actual relationship it has with its affiliates and subsidiaries so that the petitioners could sensibly clarify and refine the dimensions of its class action and the national class members who would pursue it, the Illinois Circuit Court justifiably allowed the class of plaintiffs seeking relief to encompass

> "all insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries (collectively "Liberty Mutual"), their third party beneficiaries and their assignees who submitted medical bills covered by a Liberty Mutual insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database."

However, contrary to the court of appeals' surmise, this redefined class—caused by Liberty's own refusal to enlighten either the petitioners or the state court about its relationship with its various component companies, Liberty *Fire* among them—*never* included claims which Liberty did not adjust. Instead, it includes only those claims of insureds of Liberty, its affiliates or subsidiaries *which Liberty adjusted* using the offending database.

That such a commonsense clarification of the petitioners' class in this five-year-old state litigation could be characterized as "commencing" a new civil action which gives Liberty the right to remove the matter to federal court under the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4(February 18, 2005) ("CAFA"), and there to continue to litigate this

case unencumbered by the state court contempt and default judgments which it so justly deserved in that forum, is a red flag that Congress' intent in enacting CAFA has been undermined and that this Court's decisions acknowledging the right of class members to redefine themselves without starting new litigation have been effectively overruled.

Moreover, in view of the disarray among the Circuits about CAFA's capacity to allow the removal of state court litigation begun before its enactment, this Court should resolve the confusion and define CAFA's contours so that a recalcitrant and contumacious defendant who has obstructed discovery for five years in state court is not rewarded with a federal forum where it can shed the default judgment entered against it in state court and renew its fraudulent "shell game" concerning its true identity.

CAFA, amending 28 U.S.C. Section 1332(d), confers federal jurisdiction over class actions involving at least 100 members and over $5 million in controversy when minimal diversity, i.e., diversity between *any* defendant and *any* plaintiff class member, is met. 28 U.S.C. Section 1332(d) (2)(A). See *Exxon Mobil Corp. v. Allapattah Services*, ___U.S.___, 125 S. Ct. 2611, 2640 n.12 (2005) (Ginsberg, J., dissenting). Its own removal statute allows any defendant to remove to federal district court a qualifying action without regard to the residence or consent of the other defendants, 28 U.S.C. Section 1453(b); and Section 1453(c)(1) provides for appellate review of motions to remand despite the usual bar of such review in Section 1447(d).

Congress' purpose in enacting CAFA was to ameliorate the abuses encountered by national class action plaintiffs when their rights were decided by state and local courts, undermining the national judicial system, the free flow of commerce and the concept of diversity jurisdiction. Pub. L. 109-2, Section 2(a)(4) & (b), 119 Stat. at 4-5. CAFA was therefore aimed at assuring prompt and fair recoveries for class members with legitimate claims, restoring the Framers' intent that national class actions be decided in a federal forum under diversity jurisdiction; and encouraging innovation and the lowering of consumer prices. *Id.* "While some defendants may benefit by having their cases in federal court instead of state court, this is *not* a stated purpose of the Act." *Plubell v. Merck & Co.*, 434 F.3d 1070, 1073-1074(8th Cir. 2006)(emphasis supplied).

Section 9 of CAFA makes it apply "to any civil ~~action~~ commenced on or after the date of [its] enactment," February 18, 2005, and it is not retroactive. *Exxon Mobil Corp.*, ___ U.S. at ___, 125 S. Ct. at 2627-2628. As the court in *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1095-1096(10th Cir. 2005), noted, CAFA's legislative history makes clear that the Senate's more restrictive view of its retroactive reach was adopted so that "Congress signaled an intent to narrow the removal provisions of the Act to exclude currently pending suits" and wanted the statute to apply only to civil actions actually begun *after* CAFA became effective on February 18, 2005. *Id. Brown v. Kerkhoff*, 2005 WL 2671529(S.D. Iowa 2005).

The question presented in this class action, begun in 2000, is whether the order amending the petitioners' class in the wake of a default judgment

entered against Liberty in 2005, *after* CAFA was enacted, constitutes the "commencement" of a new civil action against Liberty entitling it to remove this action to federal court. In the short time since CAFA's passage, the federal courts have employed *three* different approaches to answering this question. The first group of courts treats the language of CAFA as a "bright line," reasoning that since "a civil action" can only be commenced once, if it was commenced before CAFA was enacted, any amendment occurring in the litigation after CAFA's enactment is irrelevant and cannot invoke CAFA's right of removal. See, e.g., *Gomes v. Microsoft Corp.*, 403 F. Supp. 897, 903(S.D. Iowa 2005); *Weekly v. Guidant Corp.*, 393 F. Supp. 2d 1066, 1067-1068(E.D. Ark.2005); *Hot Springs County Solid Waste Authy. v. UnitedHealth Group*, 2006 U.S. Dist. Lexis 10028(W.D. Ark. 2006).

A second group of decisions acknowledge that with litigation begun before February 18, 2005, there may be amendments after CAFA's enactment which invoke the right to remove the matter to federal court. These courts take the position that in order to determine whether an amendment relates back to a prior pleading or kicks off fresh litigation triggering CAFA's right to remove, resort must be had to the forum state's own law governing the relation back of amendments to pleadings; and the governing state law's relation-back analysis, much along the lines of Fed. R. Civ. P. 15(c), controls the "commencement" inquiry for *all* amendments with no distinction being made for those which add defendants. See, e.g., *Prime Care of Northeast Kansas LLC v. Humana Insurance Company*, ___F.3d___, ___(10th Cir. 5/12/06); *Plubell v. Merck & Co.*, 434 F.3d at1073-1074(8th Cir.2006);

Eufaula Drugs, Inc. v. ScripSolutions, 2005 WL 2465746 at 2-4(M.D. Ala. 2005); *New Century Health Quality Alliance, Inc. v. Blue Cross & Blue Shield of Kan. City, Inc.*, 2005 WL 2219827 at 3-5(W.D. Mo. 2005).

A third group of courts employ the relation-back analysis for all amendments except those which add defendants—those amendments are categorically treated as commencing a new case as to the added defendant(s) entitling them to removal under CAFA. See, e.g., *Braud v. Transp. Serv. Co.*, 2006 WL 880051 at 1-4(5th Cir. 4/6/06); *Schillinger v. Union Pac. R.R.*, 425 F. 3d 330, 333(7th Cir. 2005); *Knudsen I*; *Adams v. Fed. Materials Co.*, 2005 WL 1862378 at 3-4(W.D. Ky. 2005).

These disparate, irreconcilable decisions by courts in the 6th, 7th, 8th, 10th and 11th Circuits about the right to remove under CAFA in the wake of amendments in ongoing state court class actions demonstrate the need for this Court to clarify the dimensions of the removal right so that Congress' intent in enacting this legislation will be realized. The confusion among the lower federal courts on this issue has frustrated congressional intent, failed to provide any durable standards for measuring the right to remove national class actions filed in state court before CAFA, and led to the spawning of strategic removal actions by well financed state court defendants seeking to frustrate, delay and impede the resolution of state court class litigation.

The court of appeals here, for example, found as a fact that the amended class definition now includes

insureds of some of Liberty's affiliates whose claims Liberty did not adjust, e.g., Liberty Northwest Corporation and Employers Insurance of Wausau, and this was enough for it to conclude that new claims had been commenced justifying Liberty's removal(*Id.* at 6-7). This finding, in turn, relied upon Liberty's own post-removal, self-serving view of the state court action, proceedings *which it had deliberately sabotaged* in order to claim prejudice before the federal courts. Instead of sending this case back to the state court for a determination of any imperfections in the amended class' definition, Judge Easterbrook peremptorily extinguished five years of state court litigation—together with the default judgment Liberty rightly deserved----and ordered the district court to decide the case on its merits without regard either to the state judge's order of default (and contempt) against Liberty or the scope of the class certification which she had approved.

Lost in this assumption of federal power over a state class action begun five years before CAFA was enacted is the simple truth that, contrary to the court of appeals' surmise, this class redefinition—caused by Liberty's own refusal throughout discovery to enlighten either the petitioners or the state court about its relationship with its various companies, Liberty *Fire* among them—*never* included claims which Liberty did not adjust. Instead, it includes only those claims of the insureds of Liberty, its affiliates or subsidiaries *which Liberty adjusted* using the offending database. If the court of appeals had any doubts on this score, it could have sent the case back to the Circuit Court and requested that Judge Nowicki issue a ruling on whether the amended class included those claims made

by insureds of Liberty, its affiliates and subsidiaries which Liberty did *not* adjust. Instead of doing so, it burdened the district judge with this five-year-old litigation which does not belong in federal court. Nothing in CAFA or in relation-back principles justifies this result.

In order to promote Congress' intent in enacting CAFA, to discourage class action defendants from "creating" new claims out of every amendment in order to forum shop, and to avoid lost time and attendant attorney's fees, this Court should adopt a "bright line" rule, i.e., that a claim is "commenced" for purposes of CAFA only with the filing of the original complaint. As the district judge in *Plummer v. Farmers Group, Inc.*, 388 F. Supp. 2d 1310,1317(E.D. Okla. 2005), recognized,

> [s]uch a test, with no exceptions, would not only be logical (i.e., a claim commences when it commences) but also predictable. Multi-factor, sliding scale, balancing tests do more than leave lawyers and litigants mired in unpredictability; *they also put too much power in the hands of federal judges*. While the [relation-back] test is consistent with the precedent on this issue..., it produces a much closer question than a bright line test.

Id.(emphasis supplied). Whether an action has been commenced here is governed by Illinois law. *Burham v. Humphrey Hospitality Reit Trust., Inc.*, 403 F.3d 709, 712(10th Cir. 2005). *Cf. Walker v. Armco Steel Corp.*, 446 U.S. 740, 751(1980)(state law determines when an action commences for limitations purposes).In Illinois, the filing of the petitioners' complaint against

Liberty in 2000 in Circuit Court commenced this suit, 735 ILCS 5/2-201(a); *Jackson v. Navik*, 308 N.E. 2d 143,145(Ill. App. 1974); *Kohlhaas v. Morse*, 183 N.E.2d 16, 19(Ill. App. 1962), and under a "bright line" test, Liberty was not entitled to remove under CAFA.

Even under Illinois' relation-back principles, see 735 ILCS 5/2-616(b); *Chandler v. Illinois Central R.R.*, 798 N.E. 2d 724, 732-733(2003), the "fresh" claim allegedly asserted by the petitioners' against Liberty with their amended class of plaintiffs in 2005 was nothing new. Its core claim of Liberty's deceptive and unfair use of a biased database remained the same as their original complaint and that seminal filing furnished Liberty with all the information it need to prepare a defense to this later amended class; nothing had changed. *McCorry v. Gooneratne*, 775 N.E.2d 591, 599(Ill. App. 1 Dist. 2002). *Marek v. OB Gyne Specialists II, S.C.*, 746 N.E.2d 1,8(Ill. App. 1 Dist. 2001). *Steinberg v. Dunseth*, 658 N.E.2d 1239, 1246(Ill. App. 4 Dist. 1995). *Accord, Phillips v. Ford Motor Co.*, 435 F.3d 785, 787-788(7th Cir. 2006).

In any event, these events are routine matters in class action suits and provide no occasion, especially after Liberty's default for its repeated failure to illuminate the nature of its holdings, to suppose that a new claim had been made against it. 735 ILCS 5/2-802(a). *Steinberg v. Chicago Medical Sch.*, 371 N.E.2d 634, 645(1977). *Regnery v. Meyers*, 679 N.E. 2d 74, 81(Ill. App. 1 Dist. 1997). Besides, Illinois law entitled the petitioners to correct by amendment the misnomer of the petitioners' class, a misnomer caused by Liberty's refusal to identify for five years its affiliates and subsidiaries, without the amendment kicking off a

new action for purposes of CAFA. 735 ILCS 5/2-616(b). *Norman A. Koglin Assoc. v. Valenz Oro*, 680 N.E. 2d 283, 290(1997). *Accord, Plubell v. Merck & Co.*, 434 F.3d at 1073; *New Century Health Quality Alliance, Inc. v. Blue Cross & Blue Shield of Kan. City, Inc.*, 2005 WL 2219827 at 4-5; *Heaphy v. State Farm Mutual Automobile Insurance Co.*, 2005 WL 1950244 at 4(W.D. Wash. 2005). Contrast *Schiavone v. Fortune*, 477 U.S. 21, 28(1986)("This was not a situation where the ascertainment of the defendant's identity was difficult for the plaintiffs").

Finally, the petitioners' suggested resolution is most consistent with this Court's recognition in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 551(1974), that the commencement of their class action in 2000 "satisfied the purpose of the limitation provision as to all those *who might subsequently participate* in the suit as well as for the named plaintiffs." *Id.* at 551-554 (emphasis supplied). Otherwise, the members of the class of plaintiffs added by the 2005 amendment—none of whom has slept on his rights—would have been forced to intervene earlier in order to preserve their claims and one of the major goals of class litigation, i.e., to simplify litigation involving a large number of class members with similar claims, would have been defeated. *Devlin v. Scardeletti*, 536 U.S. 1, 10(2002). Thus the order amending the class of plaintiffs in 2005 did not commence a new action or "fresh litigation" for purposes of CAFA and Liberty was not entitled to remove the action to federal court because of it.

2. Public Policy, Concerns For Comity And A Pragmatic Federalism Are Not Served By Usurping A State Court's Power To Enforce Its Own Judgments And Rewarding A Recalcitrant And Contumacious State Court Defendant With A Federal Forum Under CAFA Where It Can Evade The Default Judgment In State Court And Renew Its Frivolous Defense To The Petitioners' Class Action.

Liberty's interpretation of CAFA would empower federal courts to pluck cases from state court on the eve of trial or, as in this case, on the cusp of an assessment of damages after a default judgment had entered against it. Yet this view of an all-powerful federal judiciary is intolerable; it is disruptive of federal-state comity as well as the settled expectations of the litigants. Permitting removal in this case "would effectively apply new rules to a game in the final minutes of the last quarter," in effect using a jurisdictional statute like CAFA, intended to curtail "jurisdictional gaming" and forum shopping, to accomplish this very result. See *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232, 1238 (10th Cir. 2005). The disposition below also raises basic due process concerns, see *Hansberry v. Lee*, 311 U.S. 32, 40(1940), and invokes this Court's duty of superintendence over the federal judiciary to insure that our system of federalism accommodates the integrity of state court class actions and the judgments they ultimately render against recalcitrant and contumacious defendants.

CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit and, ultimately, to vacate that judgment and remand the matter to the state courts of Illinois for renewed discovery on the issue of the damages and costs due the petitioners from Liberty on the merits of their claims; or to provide the petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

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No. 05-8037

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIRSTEN KNUDSEN, CHRIS BAKER, and VIKKI BAKER,
Plaintiffs-Respondents,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Petitioner.

January 5, 2006, Submitted
January 27, 2006, Decided

COUNSEL: For LIBERTY MUTUAL INSURANCE COMPANY, Petitioner: Stephen M. Shapiro, MAYER, BROWN, ROWE & MAW, Chicago, IL, USA.

For KIRSTEN KNUDSEN, Respondent: Robert A. Holstein, HOLSTEIN LAW OFFICES, Chicago, IL, USA.

For CHRIS BAKER, VIKKI BAKER, Respondents: Paul M. Weiss, FREED & WEISS, Chicago, IL, USA.

JUDGES: Before COFFEY, EASTERBROOK, and MANION, Circuit Judges.

OPINION BY: EASTERBROOK

OPINION: EASTERBROOK, *Circuit Judge.* Liberty Mutual Insurance Company has removed this litigation to federal court a second time, again invoking the Class Action Fairness Act of 2005, 119 Stat. 4 (2005). Last year we held that the initial removal was unavailing, because the suit had been "commenced" in state court before February 18, 2005, the new Act's effective date. 411 F.3d 805 (7th Cir. 2005). Liberty Mutual contended that the only appropriate defendant is Liberty Mutual Fire Insurance Company, which had issued the policies on which plaintiffs sought to collect. It argued that a mention of Liberty Fire in a proposed amendment to the class definition effectively began a new suit. We thought otherwise, observing that Liberty Mutual remained the only defendant and that the state judge had not acted on the plaintiffs' proposal by adding either new claims or new parties. But we added: "Maybe that lies in store. . . . If in the future Liberty Mutual Fire Insurance Company should be added as a defendant, it could enjoy a right to remove under the 2005 Act, for suit *against it* would have been commenced after February 18, 2005." *Id.* at 807-08 (emphasis in original). Liberty Mutual contends that this has come to pass.

Plaintiffs allege that Liberty Mutual pays unjustifiably little on claims for medical services under workers' compensation and casualty (accident) policies. All three plaintiffs are covered by or have claims derived from policies issued by Liberty Mutual Fire Insurance Company. The suit they commenced in Illinois, however, named as a defendant only its corporate parent, Liberty Mutual Insurance Company.

The complaint did not allege that Liberty Mutual and Liberty Fire are so lax about corporate formalities that their separate existence may be disregarded under veil-piercing principles (those of Massachusetts, where they are incorporated), or that Liberty Fire deceived its insureds into thinking that the policies were backed by a firm with deeper pockets. See *United States v. Bestfoods*, 524 U.S. 51, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998) (discussing principles of state law that determine parent corporations' liability for acts of subsidiaries and affiliates). Instead the plaintiffs have argued--and the state judge has held--that Liberty Mutual is liable because it did not do enough in discovery to alert plaintiffs' counsel to the need to substitute Liberty Fire as a defendant. Indeed, the state court thought that Liberty Mutual's "concealment" of Liberty Fire's role (despite the fact that only Liberty Fire's name is on the policies) is so egregious that it has entered a default in plaintiffs' favor on the merits, leaving only damages for consideration.

After our first decision plaintiffs sought more relief-*much* more relief. They asked the state court to hold Liberty Mutual responsible for *all* policies issued by *any* subsidiary or affiliate, about 35 firms in all. Plaintiffs asked, moreover, that all claims for payment by all insureds on all of these policies everywhere in the nation be covered by the default, so that Liberty Mutual would be compelled to pay without proof that an affiliate had failed to honor any policy. It should be enough, plaintiffs contended, that an insurer disbursed less than the medical bill, regardless of any policy's actual terms. This would override co-payment requirements, caps on total indemnity, schedules of allowable fees, and many other common clauses.

Finally, plaintiffs proposed that they be certified to represent a nationwide class, and that the court disregard any difference in insurance and workers' compensation laws across the 50 states. Despite decisions by both the Supreme Court of Illinois and this court describing the grave problems with class actions for damages under multiple states' laws, see *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 835 N.E.2d 801, 296 Ill. Dec. 448 (2005); *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 288 F.3d 1012 (7th Cir. 2002), the state judge approved plaintiffs' proposal with immaterial changes. The class as certified is: "All insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries (collectively 'Liberty Mutual'), their third party beneficiaries and their assignees who submitted medical bills covered by a Liberty Mutual insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database."

The order certifying this class was entered on September 29, 2005, well after the Class Action Fairness Act's effective date, and Liberty Mutual immediately filed a notice of removal. A second removal is proper when based on a new development. See 28 U.S.C. § 1446(b) AP2: "If the case stated by the initial pleading is not removable, a notice of removal maybe filed within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable". But the district court remanded the proceeding. It held that, because Liberty Mutual remains the one and only defendant, the "commencement" date is still the time of

the suit's filing in state court, just as we held on the prior appeal. 405 F. Supp. 2d 916, 2005 U.S. Dist. LEXIS 33102 (N.D. Ill. Dec. 13, 2005). The district judge relied not only on *Knudsen I* but also on two later decisions holding that routine changes in class definitions--the sort that relate back to the original pleading for limitations purposes--do not "commence" new actions. See *Schorsch v. Hewlett-Packard Co.*, 417 F.3d 748 (7th Cir. 2005); *Schillinger v. Union Pacific R.R.*, 425 F.3d 330 (7th Cir. 2005).

Liberty Mutual is the original defendant, but it is faced with new claims for relief. Illinois law, which we described in *Schorsch* and *Schillinger*, provides that a new contention relates back to the original complaint (and hence is not a new "claim for relief " or "cause of action") when the original pleading furnishes the defendant with notice of the events that underlie the new contention. See also 735 ILCS § 5/2-616(b); *Zeh v. Wheeler*, 111 Ill. 2d 266, 282, 489 N.E.2d 1342, 1349, 95 Ill. Dec. 478 (1986). *Schorsch* holds that a complaint dealing with instructions in computer chips alleged a single claim, whether the chips were embedded in drum kits for laser printers (as the original complaint alleged) or toner cartridges that work with these drum kits (as the amended pleading added). *Schillinger* holds that a complaint dealing with railroads' use of rights of way stated a single claim no matter how many states the track passed through. Similarly, a complaint alleging that Liberty Mutual mishandled its "medical cost and utilization database" when adjusting demands for payment of medical bills would be one claim, whether Liberty Mutual or Liberty Fire had issued the policy: the grievance concerns the way that a particular "medical cost and utilization database" works, and the

number of different policies or issuers to which a single database and software package applies would be a detail, as long as Liberty Mutual itself did the adjustment work using the contested procedure.

What causes the class definition of September 2005 to initiate new claims is the fact that Liberty Mutual does not adjust all demands for payment of all of its affiliates' policies. For example, Liberty Northwest Corporation, one of Liberty Mutual's affiliates, has adjusted claims against its own policies since 1996 using its own cost-and-utilization software. The complaint initially filed in this case could not have notified Liberty Mutual that plaintiffs contested any decision made by Liberty Northwest--nor did the complaint allege that Liberty Mutual and Liberty Northwest are alter egos. It did not mention any insurer other than Liberty Mutual itself. Our first opinion, issued in June 2005, noted that plaintiffs had not made an alter-ego or veil-piercing argument. Apparently they have changed their tune, but contentions first raised in the second half of 2005 cannot demonstrate that Liberty Mutual was on notice of this claim for relief before February 18, 2005.

Employers Insurance of Wausau provides an even better example. Liberty Mutual acquired Wausau in 1998, so it is part of "Liberty Mutual" under the class definition. Wausau has employed a "medical cost and utilization database" since 1985. It adjusts its own claims, however--obviously so before the acquisition. Yet the class includes all insureds (and their assignees) whose claims were adjusted by Wausau using its own data and methods back to 1985, when Wausau's cost-and-utilization database was inaugurated. Because of the default, moreover, Liberty Mutual cannot invoke

the statute of limitations or present any other defense; to be included in the class definition is to be assured of victory. The complaint that Knudsen filed in March 2000 did not even hint that Liberty Mutual might be accountable for underpayments on the Wausau policies, claims against which had been adjusted as long as 15 years earlier under a distinct system. Any effort to recover on account of these policies is a distinct claim for relief ("cause of action" in the state's parlance). And as we intimated in *Knudsen I* and *Schorsch*, and now hold, a novel claim tacked on to an existing case commences new litigation for purposes of the Class Action Fairness Act.

The conduct of plaintiffs and the state judge in this litigation, turning an arguable error in discovery into a sprawling proceeding in which Liberty Mutual will be required to pay on account of other insurers' decisions taken long ago under different rules for calculating proper payment, and without any opportunity to defend itself on the merits or even insist that the policies' actual terms be honored, illustrates why Congress enacted the Class Action Fairness Act. The stakes exceed $ 5 million; more than two-thirds of the class members live outside Illinois; minimal diversity is established. See 28 U.S.C. § 1332(d), § 1453(b) (as amended by the 2005 Act). The addition of new claims after February 18 means that litigation has been commenced within the Act's coverage period.

We grant the petition for leave to appeal. The decision of the district court is vacated, and that court must revoke the remand and decide this litigation on the merits. The Class Action Fairness Act provides for federal resolution of the plaintiffs' claims, so the district

court need not (and should not) give any weight to the state judge's order of default and the scope of the class certification. These and all other questions are open to independent resolution in the federal forum.

No. 05-8010

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIRSTEN KNUDSEN, CHRIS BAKER, and VIKKI BAKER,
Plaintiffs-Respondents,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Petitioner.

April 29, 2005, Submitted
June 7, 2005, Decided

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For CHRIS BAKER, and VIKKI BAKER, Respondents: William J. Harte, HARTE & ASSOCIATES, Chicago, IL USA; Robert A. Holstein, HOLSTEIN LAW OFFICES, Chicago, IL USA.

JUDGES: Before COFFEY, EASTERBROOK, and WILLIAMS, Circuit Judges.

OPINION BY: EASTERBROOK

OPINION: EASTERBROOK, *Circuit Judge.* The Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005), permits defendants to remove certain class actions to federal court if minimal diversity of citizenship exists. Section 9 tells us that it applies only to suits "commenced on or after the date of enactment of this Act." That date is February 18, 2005. Invoking the removal authority under § 5, codified at 28 U.S.C. § 1453, Liberty Mutual Insurance Company removed this class action, which had been pending in state court since March 2000. The district judge promptly sent it back, observing that March 2000 precedes February 2005. Now Liberty Mutual asks us to entertain an appeal, a step that § 1453(c)(1) allows notwithstanding the norm in 28 U.S.C. § 1447(d) that remand orders are not reviewable.

We deny this petition, for we agree with *Pritchett v. Office Depot, Inc.*, 404 F.3d 1232, 2005 U.S. App. LEXIS 5896 (10th Cir. Apr. 11, 2005), that § 9 of the new Act must be taken seriously. Deconstructionist tactics do not permit its evasion. The defendant in *Pritchett* contended that the notice of removal itself commenced a new case (the one in federal court). Rebuffing that effort to sidestep the legislative decision, *Pritchett* concluded that a civil action is "commenced" for purposes of § 9 when it is *filed* in state court and not when some later step occurs in its prosecution. Equating filing with commencement is the norm in civil practice. See Fed. R. Civ. P. 3. Although there are a few exceptions--for example, a litigant who seeks to proceed *in forma pauperis* may be unable to get the suit under way until the judge accepts the complaint and authorizes service on the defendants, see *Williams-Guice v. Chicago Board of Education*, 45 F.3d

161 (7th Cir. 1995)--none applies here. This suit against Liberty Mutual has been ongoing for years.

Instead of arguing that removal equals "commencement," Liberty Mutual contends that any substantial change to the class definition "commences" a new case. Now as a matter of normal language (and normal legal practice) a new development in a pending suit no more commences a new suit than does its removal. Plaintiffs routinely amend their complaints, and proposed class definitions, without any suggestion that they have restarted the suit--for a restart (like a genuinely new claim) would enable the defendant to assert the statute of limitations. Liberty Mutual concedes that routine changes do not allow removal but insists that a "substantial" or "significant" change must do so. Yet significance is not the measure of a new claim; a plaintiff may assert an entirely novel legal theory in mid-suit without creating a "new" claim in the sense that the defendant could block it by asserting that it had been propounded after the period of limitations expired. Moreover, "significance" often lies in the eye of the beholder; it is not a rule of law so much as it is a cast of mind or an assessment of likely consequences, which may be difficult if not impossible to foresee. A doctrine of "significant change" thus would go against the principle that the first virtue of any jurisdictional rule is clarity and ease of implementation. See, e.g., *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03, 100 L. Ed. 2d 178, 108 S. Ct. 1717 (1988); *Hoagland v. Sandberg, Phoenix & Von Gontard, P.C.*, 385 F.3d 737, 740 (7th Cir. 2004) (collecting authority).

Liberty Mutual paints a picture of crafty lawyers tending a garden of pre-2005 class actions, in which

they plant new claims by amendment so that the 2005 Act never comes into play. As we have already hinted, however, a new claim for relief (a new "cause of action" in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes even if it bears an old docket number for state purposes. Removal practice recognizes this point: an amendment to the pleadings that adds a claim under federal law (where only state claims had been framed before), or adds a new defendant, opens a new window of removal. 28 U.S.C. § 1446(b). See Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 14C *Federal Practice & Procedure* § 3732 at 311-48 (3d ed. 1998). We imagine, though we need not hold, that a similar approach will apply under the 2005 Act, perhaps modeled on Fed. R. Civ. P. 15(c), which specifies when a claim relates back to the original complaint (and hence is treated as part of the original suit) and when it is sufficiently independent of the original contentions that it must be treated as fresh litigation. See also *Schiavone v. Fortune*, 477 U.S. 21, 91 L. Ed. 2d 18, 106 S. Ct. 2379 (1986); *Arendt v. Vetta Sports, Inc.*, 99 F.3d 231 (7th Cir. 1996). This possibility does Liberty Mutual no good, however, because the change in class definition does not present a novel claim for relief or add a new party.

Maybe that lies in store. The suit charges Liberty Mutual with failing to live up to promises made in its policies. Plaintiffs proposed this class:

All LIBERTY insureds, their third party beneficiaries and their assignees who are entitled to payment of

medical bills under any medical payments coverages pursuant to a LIBERTY insurance policy, and who have received a payment from LIBERTY for less than the medical charge, based upon the application of LIBERTY's medical cost and utilization database.The complaint defined "LIBERTY" as Liberty Mutual Insurance Company--which is only natural, as it is the sole defendant. Liberty Mutual responded that plaintiffs could not represent this class, for they don't belong to it. All three plaintiffs' claims derive from policies issued by Liberty Mutual Fire Insurance Company, an insurer with its own policies and reserves. So on February 25, 2005, plaintiffs proposed to amend the class definition in a way that would make them members, and hence eligible to be representatives:All Liberty Mutual Insurance Company and Liberty Fire Insurance Company insureds, their third party beneficiaries and their assignees who submitted medical bills under any medical payments coverages pursuant to a Liberty Mutual or Liberty Fire insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

This is an odd revision--and not simply because "Liberty Fire Insurance Company" does not exist. The fatal problem is that Liberty Mutual Fire Insurance Company is not a party to the suit, so no relief could be entered against it. (Plaintiffs do not contend that Liberty Mutual Fire Insurance Company and Liberty Mutual Insurance Company are alter egos. If these were just two names for one business, then no change in the class definition would have been necessary.) Before the state judge could address the plaintiffs' latest proposal, however, Liberty Mutual Insurance

removed the case. That's unavailing, for reasons we have covered. If in the future Liberty Mutual Fire Insurance Company should be added as a defendant, it could enjoy a right to remove under the 2005 Act, for suit *against it* would have been commenced after February 18, 2005. But Liberty Mutual Insurance Company cannot remove five years after this suit was commenced just because a non-party corporate sibling has been mentioned in plaintiffs' latest papers.

The petition for leave to appeal is denied. This makes it unnecessary to act on Knudsen's motion to strike the petition for leave to appeal–though we hope that in the future potential appellees will address the issues directly rather than move to strike the appellants' papers. The motion to strike supposes that the Class Action Fairness Act does not apply (and, since it does not, that 28 U.S.C. § 1447(d) forecloses appellate review). Yet whether the 2005 Act *does* apply is the very issue to be determined, and "a federal court always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S 622, 628, 153 L. Ed. 2d 586, 122 S. Ct. 2450 (2002). A motion to strike begs the principal question.

No. 05 C 5924

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

DR. KIRSTEN KNUDSEN, D.C.,
Plaintiff,

and

CHRIS BAKER and VIKKI BAKER,
Plaintiffs-Intervenors

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant.

December 13, 2005, Decided
December 13, 2005, Filed

NOTICE: THIS OPINION WAS VACATED BY THE COURT

COUNSEL: For Kirsten Knudsen, individually and on befalf of all others persons and entities similarly situated, Plaintiff: Robert A. Holstein, Holstein Law Offices LLC, Chicago, IL.

For Liberty Mutual Insurance Company, Defendant: Russell Yager, Vinson & Elkins, Dallas, TX; Steven Brian Belgrade, George Mario Velcich, Belgrade & O'Donnell PC, Chicago, IL; Howard J. Roin, Joel David Bertocchi, John Roggen Schmidt, Stephen J Kane, Mayer, Brown, Rowe & Maw LLP, Chicago, IL; John

Andrew O'Donnell, Belgrade & O'Donnell PC, Chicago, IL;

For Chris Baker, Vikki Baker, Intervenor Plaintiffs: Paul M. Weiss, Jonathan B. Piper, William Michelangelo Sweetnam, Freed & Weiss LLC, Chicago, IL.

JUDGES: Judge Ruben Castillo, United States District Court Judge.

OPINIONBY: Judge Ruben Castillo

OPINION:

MEMORANDUM OPINION AND ORDER

Judge Ruben Castillor

Dr. Kirsten Knudsen and Chris and Vikki Baker ("Plaintiffs") sued Liberty Mutual Insurance Company ("Liberty") in March 2000 on behalf of themselves and a class of similarly situated persons, alleging that Liberty improperly used medical cost and utilization databases to reduce amounts paid for claims to reimburse its customers for medical expenses incurred under its insurance policies. On September 29, 2005, Cook County Circuit Court Judge Julia Nowicki certified Plaintiffs' amended class definition, and Liberty filed its second notice of removal to federal court. At issue is Plaintiffs' motion to remand the case to state court.

I. Background

On March 30, 2005, Liberty filed its first notice of removal from the Circuit Court of Cook County on the grounds that the Class Action Fairness Act of 2005,

Pub. L. 109-2, 119 Stat. 4 (2005) ("CAFA"), permitted removal of the class action to federal court. On April 19, 2005, this Court ruled that the case was improperly removed to federal court and remanded the case to state court. *See* Order of April 19,2005. Liberty petitioned for leave to appeal the remand. The Seventh Circuit denied Liberty's petition. *Knudsen v. Liberty Mut. Ins. Co., 411 F.3d 805, 806 (7th Cir. 2005).*

Liberty filed another notice of removal to federal court on October 14, 2005 (R. 1), after the state court entered an order on September 29, 2005, certifying the following plaintiff class:

> All insureds of Liberty Insurance Company, its affiliates and subsidiaries (collectively "Liberty"), their third party beneficiaries and their assignees who (1) submitted medical bills covered by a Liberty insurance policy, (2) whose claims were adjusted by Liberty, and (3) whose claims were paid in an amount less than the medical charge, based upon the application of a medical cost and utilization database.

(R. 22, Motion to Remand, Ex. A, Sept. 29 Order at 2.) On October 18, Liberty filed a Corrected Notice of Removal (R. 12), in which Liberty contends that removal is now proper under the Class Action Fairness Act because: (1) the September 29 order adds new claims that do not relate back to the filing of the original complaint in March 2000; and (2) some of the new claims are completely preempted under the Employee Retirement Income Security Act ("ERISA"). Plaintiffs filed the instant motion to remand.[1]

II. Class Action Fairness Act

The Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005), permits defendants to remove certain class actions to federal court if minimal diversity of citizenship exists. CAFA applies only to suits commenced on or after the date of its enactment, February 18, 2005. *Knudsen, 411 F.3d at 806.* In Liberty's first attempt at removal, Liberty argued that Plaintiffs' proposed change of the class definition from "all Liberty insureds" to "All Liberty Insurance Company and Liberty Fire Insurance Company insureds," commenced a new action under CAFA. *Id. at 806-07.* In denying Liberty's petition for leave to appeal, the Seventh Circuit held that a new action was not commenced by the proposed change in class definition. *Id.* While the Seventh Circuit left open the possibility that "a new claim for relief (a new ' cause of action' in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes," the Seventh Circuit held that "this possibility does Liberty no good, however, because the change in class definition does not present a novel claim for relief or add a new party." *Id. at 807.*

Since *Knudsen*, the Seventh Circuit has considered three other cases where the defendant argued that a change in class definition was sufficiently distinct so as to constitute the commencement of a new action.[2] The Seventh Circuit denied the petition for leave to appeal the district court's remand order in each case and emphasized the unlikelihood that the amendment to a class definition could ever constitute the commencement of a new action under CAFA. In

Schorsch v. Hewlett-Packard, although the Seventh Circuit stated that it "can imagine amendments [to the class definition] that kick off wholly distinct claims," the Court of Appeals reiterated that "creative lawyering will not be allowed to smudge the line drawn by the 2005 Act. . . . Amendments to class definitions do not commence new suits." *417 F.3d 748, 751 (7th Cir. 2005).* Likewise, in *Schillinger v. Union Pacific R. Co.,* the Seventh Circuit repeated that "the expansion of a proposed class does not change the parties to the litigation nor does it add new claims." *425 F.3d 330, 334 (7th Cir. 2005)* (emphasis added).

Nevertheless, Liberty claims that the instant case is the "possibility" that the Seventh Circuit "can imagine." In other words, Liberty argues that the state court certification of Plaintiffs' amended class definition from all insureds of Liberty Insurance Company to all insureds of Liberty, its affiliates and subsidiaries, commenced a new action. The test for whether an expanded class definition commences a new action for CAFA removal purposes is whether the new claim "relates back" to the original claim. A claim relates back when it arises out of the same transaction or occurrence as the claim in the original complaint.[3] *Schorsch, 417 F.3d at 751.* An amendment relates back in Illinois "when the original complaint furnished to the defendant all the information necessary . . . to prepare a defense to the claim subsequently asserted . . ." *Id.* (citations omitted).

Liberty alleges that the new class definition contains wholly distinct claims because it: (1) involves additional policies; (2) creates different theories of liability; (3) reaches back farther in time; and (4) arises under federal law. Each of Liberty's arguments fail.

First, while the expanded class definition does involve additional and different policies, "the potential for a larger amount of legal research and discovery in and of itself is not a significant enough step to create new litigation." *Schillinger, 425 F.3d at 334.* In *Schillinger,* the plaintiffs wanted to expand the class from Illinois land owners who allegedly had been harmed by Union Pacific Railroad Company's ("UPRR") use of rights-of-way on their land to property owners nationwide who owned land over which UPRR had a right-of-way. *Id. at 333.* Despite the creation of a nationwide class of plaintiffs, the Seventh Circuit held that this change did not create new litigation. *Id. at 334.* In the instant case, the expansion in research and discovery for Liberty under the new class definition is narrower than in *Schillinger* and involves entities related to Liberty. Thus, the new class definition does not commence a new action by expanding the sheer number of policies at issue.

Second, Liberty argues that the addition of its "affiliates and subsidiaries" created new legal theories of liability based on the claim that Liberty is an "alter-ego" of the affiliates and subsidiaries. However, Illinois state courts and the Seventh Circuit agree that new legal theories, in particular those adding vicarious liability theories of liability, do not create new claims. *See Knudsen, 411 F.3d at 806* ("a plaintiff may assert an entirely novel legal theory in midsuit without creating a new' claim in the sense that the defendant could block it by asserting that it had been propounded after the period of limitations expired"); *Marek v. O.B. Gyne Specialists II, S.C., 319 Ill. App. 3d 690, 699, 746 N.E.2d 1, 9, 253 Ill. Dec. 759 (1st Dist. 2001)* (claim related back because party could not claim surprise or prejudice

where amended pleading contained allegations identical to those made against party's agent, employee and shareholder in original complaint); *Steinberg v. Dunseth, 276 Ill. App. 3d 1038, 1046, 658 N.E.2d 1239, 1246, 213 Ill. Dec. 218 (4th Dist. 1995)* (finding that the addition of vicarious liability counts that were similar to direct liability counts in the original complaint related back, and "the fact that there is a change in [legal] theory is not significant" by itself). Liberty's reliance on *Kennedy v. King, 252 Ill. App. 3d 52, 56, 623 N.E.2d 955, 958, 191 Ill. Dec. 365 (4th Dist. 1993)*, is misplaced. While Liberty alleges a new claim commenced a new action in the instant case, in *Kennedy*, the state court held that a subsequent action for agency or negligent entrustment did not relate back to an original action for negligence against the automobile owner. *Id.* Thus, new legal theories, if any, do not provide a basis for removal to federal court.

Third, Liberty argues that the class certification order created new claims because the order reaches farther back in time. Although the original class definition did not specify a time frame, Liberty did not begin using medical cost and utilization databases to adjust claims for medical benefits under the policies Liberty wrote until 1994. The amendment to the class definition, however, allegedly added two Liberty affiliates or subsidiaries -- Liberty Life and Employers of Wausau -- that began using medical cost and utilization databases to adjust claims for reimbursement of medical bills under group-health policies in the mid-1980's.

The alleged change in time-frame, like the increase in the number of policies at issue, does nothing more than increase "the potential for a larger amount of legal

research and discovery." *Schillinger, 425 F.3d at 334.* In *Schillinger*, the Seventh Circuit reasoned that expanding the plaintiff class from state-wide to nation-wide did not commence a new action because the suit still involved "the same claim alleged in the original complaint" and plaintiffs similarly situated to the Schillingers. *Id.* That same reasoning applies in this case. The class certification order does not change Plaintiffs' original claim: that "claims were paid in an amount less than the medical charge, based upon the application of a medical cost and utilization database." In addition, the plaintiffs, regardless of how far back in time their medical claims reach, all share this ultimate claim.

The Illinois cases to which Liberty cites do not change this analysis. In *Flynn v. Szwed*, the plaintiff's original complaint contained specific allegations of medical negligence occurring in 1980, and the plaintiff attempted to add other, distinct claims of negligence that occurred in 1978 and 1979. *224 Ill. App. 3d 107, 115, 586 N.E.2d 539, 544, 166 Ill. Dec. 581 (1st Dist. 1991).* The state court held that these discrete acts did not constitute a continuous, regular course of treatment, and thus did not relate back. Similarly, in *Strickland v. Commc'ns & Cable of Chi., Inc.*, the plaintiff attempted to amend the original complaint to include a distinct claim of negligence. The plaintiff, who had been assaulted by an employee of the defendant, originally alleged that the defendant was negligent for not adequately investigating its employee's background before hiring him. *304 Ill. App. 3d 679, 687, 710 N.E.2d 55, 61, 237 Ill. Dec. 632 (1st Dist. 1999).* The state court held that the plaintiff could not amend her complaint to add claims that the defendant approved and ratified the

assault, because this was a separate claim of negligence that occurred after the assault. *Id. at 685.*[4] In contrast, in the instant case, as in *Schillinger*, the expanded class involves the same allegations of use of the medical cost and utilization database to pay plaintiffs less than the medical charge, and thus relates back to the original complaint.

III. ERISA

Liberty next contends that its case must be removed because the expanded class definition adds ERISA claims. Liberty argues that the addition of ERISA claims both commences a new action under CAFA, and provides grounds for removal to federal court under the complete preemption doctrine. The ERISA claims allegedly arise from two of Liberty's affiliates, Liberty Fire and Employers of Wausau, who issued group health policies as part of employee-benefit plans and used medical cost and utilization databases to reduce payments under those policies. Liberty claims that the expanded plaintiff class includes insureds under these plans, who will seek to recover benefits due to them under the terms of the plans.

The class certification order, however, neither adds ERISA claims nor presents a basis for complete preemption. The civil enforcement provision of *ERISA, Section 502(a)*, allows a plan participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *Section 502(a)* completely preempts state law causes of action that fall within the scope of that provision. *Moran v. Rush Prudential HMO, Inc., 230 F.3d 959, 967 (7th Cir. 2000)*

(quoting *ERISA, § 502(a)(1)(B)*). Considered in a vacuum, *Section 502(a)* appears to be implicated in the expanded class definition of "all insureds" of Liberty, its affiliates and subsidiaries. However, as Liberty bases its arguments for removal on the state court's class certification order, Liberty cannot look to the class definition while ignoring the state court's clear intent in the certification order. The class certification order must be read in its entirety, together with the class definition, to determine if removal is proper. The first paragraph of the state court's certification order and opinion shows that ERISA claims are not covered by the new class definition:

> This case involves a class action suit brought in connection with payments made by Liberty Insurance Company ('Liberty') pursuant to workers compensation and automobile policies allegedly issued by Liberty. Liberty's property and casualty policies obligate it to pay for all reasonable expenses for medical treatment related to covered occurrences.

(R. 22, Mot. to Remand, Ex. A, Sept. 29 Order at 1.)[5] Thus, in the first paragraph of her order and opinion, Judge Nowicki explained that the new class would only include insureds of "workers compensation and automobile policies," or "property and casualty policies." *Id.* Although the class definition says "all insureds," not excepting those insured under group health policies, neither Liberty, Plaintiffs, nor the state court ever contemplated ERISA claims. This is not an attempt at "artful pleading" by Plaintiffs to avoid a federal claim; rather, it is a creative attempt by Liberty to find another way into federal court. *Lehmann v. Brown, 230*

F.3d 916, 919 (7th Cir. 2000). While a claim to ERISA benefits necessarily arises under federal law, there is no claim to ERISA benefits here. *Id.* ("Courts look at substance, see the importance of federal law to recovery, and permit removal"). Indeed, a "mere simulacrum of a possible unasserted ERISA claim [is] insufficient to form a basis for federal jurisdiction." *Karambelas v. Hughes Aircraft Co., 992 F.2d 971, 975 (9th Cir. 1993)*.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion to Remand is GRANTED, and this case is remanded to state court based on lack of federal jurisdiction, in accordance with *28 U.S.C. § 1447(c)*. Section *28 U.S.C. § 1447(c)* makes an award of attorneys' fees "the norm" for improper removal. *Schorsch, 417 F.3d at 751*. In view of the history of the case, the Court will adhere to the norm and hereby awards reasonable attorneys' fees to Plaintiffs.

ENTERED:

Judge Ruben Castillo

United States District Court

Dated: December 13, 2005

Footnotes

n1 Contrary to Plaintiffs' arguments, Liberty's removal was timely. Although the amended class definition was first proposed on July 7, 2005, it was not certified until September 29, 2005, and Liberty removed two weeks later, on October 14, 2005. *See Sullivan v. Conway, 157 F.3d 1092, 1094 (7th Cir. 1998)* (Time for removal of

case began when state court judge granted plaintiff's motion to amend complaint to add federal claims, not when plaintiff made motion to amend).

n2 *See Pfizer, Inc., v. Lott, 417 F.3d 725 (7th Cir. 2005)*; *Schorsch v. Hewlett-Packard Co., 417 F.3d 748 (7th Cir. 2005)*; *Schillinger v. Union Pac. R.R. Co., 425 F.3d 330 (7th Cir. 2005)*.

n3 Although Illinois law supplies the rule of decision in this case, the Illinois and federal rules for relation back are "functionally identical." *Schorsch, 417 F.3d at 751*.

n4 Liberty also mistakenly relies on *Senterfitt v. SunTrust Mortgage, Inc., 385 F. Supp. 2d 1377 (S.D. Ga. 2005)*. In declining to find relation back when the plaintiff class was expanded from a four to twenty-year period, the Georgia district court specifically declined to follow the Seventh Circuit precedent in *Schorsch:* "I decline to follow *Schorsch* because it is not binding precedent and the Seventh Circuit's treatment of relation back in the context of increasing the size of a class action appears to differ from the Eleventh Circuit's approach." *Id. at 1379 n.3*.

n5 Liberty is correct that Plaintiffs cannot now stipulate to a limitation on the class; however, as the class was never broadened as Liberty alleges, such a stipulation would be redundant. *See Matter of Shell Oil Co., 970 F.2d 355, 356 (7th Cir. 1992)* (a post-removal stipulation or amendment limiting the plaintiff's claim does not authorize a remand).

No. 05-8037
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIRSTEN KNUDSEN, CHRIS BAKER, and VIKKI BAKER,
Plaintiffs-Respondents,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Petitioner.

February 22, 2006, Decided

NOTICE: RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

JUDGES: Before Hon. JOHN L. COFFEY, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. DANIEL A. MANION, Circuit Judge.

OPINION: Order

Plaintiffs-Respondents filed a petition for rehearing and rehearing en banc on February 10, 2006. No judge in regular active service has requested a vote on the petition for rehearing en banc,* and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Footnote

*Chief Judge Flaun and Judge Williams did not participate in the consideration of this petition.

Relevant Provisions Involved

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. Section 1332(d)(2)(A):

The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum of $5,000,000, exclusive of interests and costs, and is a class action in which ----

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant....

28 U.S.C. Section 1453(b) and (c):

(b) **In General.**----A class action may be removed to a district court of the United States in accordance with section 1446...without regard to whether any defendant is a citizen of the State in which the action is brought....

(c) Review of Remand Orders.----

(1) **In General.**----Section 1447 shall apply to any removal of a case under this section, except that...a court of appeals may accept an appeal from an order of the district court granting or denying a motion a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

Section 9 of Public Law No. 109-2 (CAFA):

The amendments made by this Act shall apply to any civil action commenced on or after the date of the enactment of this Act.

[CAFA was enacted February 18, 2005]

735 ILCS 5//2-201(a):

Commencement of actions----Forms of process. (a) Every action, unless otherwise expressly provided by statute, shall be commenced by the filing of a complaint....

735 ILCS 5/2-616(a), (b), (c) and (d):

Amendments. (a) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant...which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim.

(b) The cause of action...set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted...in the amended pleading grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of

some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended.

(c) A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just.

(d) A cause of action against a person not originally named a defendant is not barred by lapse of time under any statute...limiting the time within which an action may be brought or right asserted, if all the following terms and conditions are met: (1) the time prescribed or limited had not expired when the original action was commenced; (2) the person, within the time that the action might have been brought or the right asserted against him or her plus the time for service permitted...received such notice of the commencement of the action that the person will not be prejudiced in maintaining a defense on the merits and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him or her; and (3) it appears from the original and amended pleadings that the cause of action asserted in the amended pleading grew out of the same transaction or occurrence set up in the original pleading....For the purpose of preserving the cause of action under those conditions, an amendment adding the person as a defendant relates back to the date of the filing of the original pleading so amended.

735 ILCS 5/2-802(a):

Order and findings relative to the class. (a) Determination of Class. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class. This order may be conditional and may be amended before a decision on the merits.

Fed. R. Civ. P. 15(c):

Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

...

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth or attempted to be set forth in the original pleading; or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(j) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party....

(2)

Supreme Court, U.S.
FILED
JUL 26 2006
OFFICE OF THE CLERK

No. 05-1496

In the Supreme Court of the United States

DR. KIRSTEN KNUDSEN, D.C., CHRIS BAKER AND VIKKI BAKER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Counsel for Respondent

QUESTION PRESENTED

In March 2000, petitioners filed this action against Liberty Mutual Insurance Company ("Liberty") in state court on behalf of a putative class of claimants under casualty policies issued by Liberty. In September 2005, the state court greatly expanded the case by issuing a class-certification order permitting petitioners to sue Liberty on behalf of a nationwide class including not only claimants under casualty policies issued by Liberty, but also claimants under casualty and group-health policies issued by thirty-five of Liberty's affiliates and subsidiaries. Liberty then removed the case under the Class Action Fairness Act of 2005 ("CAFA"), which authorizes removal of certain interstate class actions "commenced" on or after February 18, 2005.

The question presented is whether the Court should review the Seventh Circuit's fact-bound determination that the state court's September 2005 class-certification order commenced a new action removable under CAFA because it added new claims that do not relate back to the filing of petitioners' pre-CAFA pleadings under Illinois law.

RULE 29.6 STATEMENT

The following is a list of all corporate parents of respondent Liberty Mutual Insurance Company:

Liberty Mutual Holding Company, Inc.

LMHC Massachusetts Holdings, Inc.

Liberty Mutual Group, Inc.

Neither respondent Liberty Mutual Insurance Company nor any of its corporate parents is a publicly traded corporation. Thus, no publicly held company owns 10 percent or more of the stock of Liberty Mutual Insurance Company.

Further, none of the subsidiaries of respondent Liberty Mutual Insurance Company is a publicly traded company. Each is either owned entirely by Liberty Mutual Insurance Company or owned partly by Liberty Mutual Insurance Company and partly by one or more other subsidiaries of the three corporate parents listed above. Thus, no publicly held company owns 10 percent or more of the stock of any subsidiary of Liberty Mutual Insurance Company.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

In a fact-bound opinion, a unanimous panel of the Seventh Circuit concluded that a class-certification order issued by the state court after CAFA's enactment "commenced" new litigation that was removable under CAFA because it added new claims that do not relate back to petitioners' pre-CAFA pleadings under Illinois law. Petitioners' request for rehearing and rehearing en banc was unanimously denied.

Petitioners fail to advance any reason that would warrant this Court's review. Although petitioners strain to manufacture a conflict, in reality the courts of appeals have uniformly held that post-CAFA conduct such as the massive change of the case here can commence a new action and thus permit removal under CAFA. Nor do petitioners identify any extraordinary circumstance that might justify review in the absence of a conflict. To the contrary, petitioners concede that Illinois law governs whether the state court's class-certification order commenced a new action. Moreover, petitioners' contention that this Court's review is necessary is belied by the fact that the number of cases presenting the question whether (and under what circumstances) a defendant may remove a pre-CAFA case based on post-CAFA conduct diminishes with each passing day.

Rather than explain why this Court's review is needed, petitioners attempt to impugn Liberty's conduct in this litigation through a series of baseless charges that lack a single citation to the record. But as the facts described below demonstrate—and as the Seventh Circuit expressly concluded—"[t]he conduct of plaintiffs and the state judge in this litigation, turning an arguable error in discovery into a sprawling proceeding in which [Liberty] will be required to pay on account of other insurers' decisions taken long ago under different rules for calculating proper payment, and without any opportunity to defend itself on the merits or even insist that the policies' actual terms be honored, illustrates why Congress enacted the Class Action Fairness Act." Pet. App. 7a.

STATEMENT

A. By Enacting CAFA, Congress Sought To Provide A Federal Forum To Resolve Class Actions Of Nationwide Importance.

In passing CAFA, Congress found that "there have been abuses of the class action device that have * * * harmed class members with legitimate claims and defendants that have acted responsibly." Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, § 2(a)(2)(A). Congress concluded that such abuses "undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution." *Id.* § 2(a)(4). Congress further declared that "State and local courts are * * * keeping cases of national importance out of Federal court"; "sometimes acting in ways that demonstrate bias against out-of-State defendants"; and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." *Ibid.* Thus, one of the express purposes of CAFA was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Id.* § 2(b)(2).

To effectuate that purpose, CAFA enlarged federal jurisdiction over certain class actions. Thus, subject to certain exceptions that are inapplicable here, CAFA permits defendants to remove putative class actions where: (1) the aggregate amount in controversy exceeds $5 million; and (2) minimal diversity exists, *i.e.*, at least one member of the class is a citizen of a different state from any defendant. 28 U.S.C. § 1453(b); see also 28 U.S.C. § 1332(d). Petitioners do not dispute that both of these requirements are satisfied here.

However, CAFA applies to "any civil action commenced on or after the date of enactment of this Act"—February 18, 2005—and this case was first filed before that date. Pub. L.

No. 109-2, § 9. The issue presented to the Seventh Circuit was whether the massive post-CAFA changes to this case, which were so significant that the newly added claims would not relate back under Illinois law, constituted commencement of a new action within the meaning of CAFA.

B. Petitioners' Pre-CAFA Pleadings Alleged A Narrow Class Limited To Persons Covered By Casualty Policies Issued By Liberty.

Petitioner Kirsten Knudsen filed this putative class action against Liberty in Cook County Circuit Court in March 2000, alleging breach of contract and consumer fraud. C.A. App., Tab 1. According to the complaint, Knudsen is a chiropractor who treated an injured worker covered under a workers' compensation policy issued by Liberty. *Id.* ¶ 18. The complaint alleged that the injured worker assigned to Knudsen his right to seek reimbursement from Liberty. *Id.* ¶ 20. The complaint further alleged that Liberty failed to reimburse Knudsen fully for certain procedures because Liberty used a medical cost and utilization database to adjust the charges for those procedures. *Id.* ¶ 4.

Defining "LIBERTY" to mean "Liberty Mutual Insurance Company," the complaint stated that Liberty's adjustment of medical claims under "casualty insurance written by LIBERTY" formed the "gravamen" of the lawsuit. C.A. App., Tab 1 ¶ 1. The complaint defined the following class:

> [A]ll LIBERTY insureds, their third party beneficiaries and their assignees who were entitled to payment of medical bills under any casualty coverages pursuant to a LIBERTY insurance policy, and who have received a payment from LIBERTY for less than the medical charge, based upon the application of LIBERTY'S internal generated medical cost and utilization database.

Id. ¶ 10.

Knudsen filed an amended complaint in March 2001. C.A. App., Tab 2. Contrary to petitioners' unsupported contention that the amended complaint adopted an "open-ended description of the respondent Liberty," Pet. 4, the amended complaint specifically defined "LIBERTY" to mean "Liberty Mutual Insurance Company." C.A. App., Tab 2 ¶ 1; see also Pet. App. 13a ("The complaint defined 'LIBERTY' as Liberty Mutual Insurance Company—which is only natural, as it is the sole defendant"). Moreover, the amended complaint reiterated that Liberty's adjustment of medical claims under "policies written by LIBERTY" formed the "gravamen" of the suit. C.A. App., Tab 2 ¶ 1. The amended complaint defined the following class:

> [A]ll LIBERTY insureds, their third party beneficiaries and their assignees who are entitled to payment of medical bills under any medical payments coverages pursuant to a LIBERTY insurance policy, and who have received a payment from LIBERTY for less than the medical charge, based upon the application of LIBERTY'S medical cost and utilization database.

Id. ¶ 11.

Thus, contrary to petitioners' assertion, both of Knudsen's pre-CAFA complaints defined a class limited to "LIBERTY insureds" under "LIBERTY insurance polic[ies]." As the Seventh Circuit noted, neither complaint so much as mentioned any of Liberty's affiliates or subsidiaries. Pet. App. 6a (petitioners' pre-CAFA pleadings "did not mention any insurer other than [Liberty] itself").

In December 2001, the state court denied Liberty's motion to dismiss the amended complaint. *Knudsen* v. *Liberty Mut. Ins. Co.*, 2001 WL 34401234 (Ill. Cir. Ct. Dec. 7, 2001). Although (a) the policy at issue provided workers' compensation insurance, (b) Knudsen's standing rested on an as-

signment of workers' compensation benefits that cannot be assigned, 820 ILCS 305/21, (c) Illinois trial courts "have no original jurisdiction over workers' compensation proceedings," *Hartlein* v. *Ill. Power Co.*, 601 N.E.2d 720, 727 (Ill. 1992), and (d) "Illinois law does not allow a provider of medical care to sue a workers' compensation carrier" in any forum, *Foster McGaw Hosp.* v. *Bldg. Material Chauffeurs, Teamsters & Helpers Welfare Fund*, 925 F.2d 1023, 1024 (7th Cir. 1991), the state judge nevertheless held that Knudsen's claims did not arise under the Illinois Workers' Compensation Act and that Knudsen could pursue her claims in state court. *Knudsen*, 2001 WL 34401234, at *2-4.

C. The State Court Struck Liberty's Answer And Affirmative Defenses.

In July 2003, Knudsen—by now joined by intervenors Chris and Vikki Baker—filed a motion for default based on Liberty's purported discovery violations. *Knudsen* v. *Liberty Mut. Ins. Co.*, 2004 WL 625679 (Ill. Cir. Ct. Mar. 26, 2004). Liberty responded by arguing, *inter alia*, that petitioners lacked standing because Liberty Mutual Fire Insurance Company ("Liberty Fire")—a separate affiliate of Liberty—wrote the policies underlying their claims. *Id.* at *1; see also Pet. App. 13a ("All three plaintiffs' claims derive from policies issued by Liberty Mutual Fire Insurance Company, an insurer with its own policies and reserves"). Petitioners "admitted that the policies indicate they were issued by Liberty Fire," but claimed that Liberty somehow "hid" Liberty Fire's identity as the correct defendant. *Knudsen*, 2004 WL 625679, at *1. Accepting petitioners' argument, the state court sanctioned Liberty for this purported misconduct by striking its answer and affirmative defenses. *Id.* at *5-6.[1]

[1] Petitioners tried to bolster their argument by manufacturing a nefarious motive—that Liberty hoped to hide the identity of the proper defendant (Liberty Fire) until the statute of limitations had run. Petitioners' motive theory foundered, however, on the undisputed fact that Liberty Fire offered to waive its limitations defense if petitioners sued the correct defen-

In reality, petitioners had long known that Liberty Fire issued the policies underlying their claims and was thus the proper defendant. As petitioners conceded and as the Seventh Circuit expressly found, "only Liberty Fire's name is on the policies." Pet. App. 3a. Moreover, petitioners received letters and other documents as early as 2001 that clearly identified Liberty Fire as the issuer of the policies. C.A. App., Tab 6 at 8-9 & Ex. 2. Indeed, long before CAFA was enacted, the Bakers named Liberty Fire as a defendant in a similar case that they had filed in Washington. *Id.*, Tab 36 at 5 n.3. The record therefore shows that, far from "hiding" Liberty Fire's identity as the correct defendant, Liberty informed petitioners of their mistake.

Given their longstanding knowledge that they sued the wrong defendant, petitioners' refusal to sue Liberty Fire can be explained only as a strategic choice. Under Illinois law, adding Liberty Fire as a defendant—as the Bakers did in their Washington case—would have entitled Liberty Fire to the substitution of a new judge. 735 ILCS 5/2-1001(a)(2). Dismissing this action against Liberty and filing a new action against Liberty Fire likewise would have resulted in the assignment of a new judge. Faced with these alternatives, petitioners chose to ignore the fact that they sued the wrong defendant in order to keep the case in front of a judge who had proven receptive to their claims.

D. The Seventh Circuit Rejected Liberty's Initial Removal.

On February 10, 2005, Liberty filed its principal brief in opposition to petitioners' motion for class-certification. C.A. App., Tab 9. Liberty argued, *inter alia*, that petitioners were inadequate representatives of the putative class because they based their claims on policies issued by Liberty Fire, not Liberty. *Id.* at 29-30. In a reply brief filed shortly after

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dant. C.A. App., Tab 19 at 1 & Ex. 1. As explained above, petitioners refused to name the proper defendant for their own strategic reasons.

CAFA's enactment, petitioners proposed to solve that problem by expanding their previously proposed class definition to include Liberty Fire's insureds:

> All Liberty Mutual Insurance Company and Liberty Fire Insurance Company insureds, their third party beneficiaries and their assignees who submitted medical bills under any medical payments coverages pursuant to a Liberty Mutual or Liberty Fire insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

Id., Tab 10 at 2. Petitioners did not, however, add Liberty Fire as a defendant.

Liberty responded to the new class definition by removing the case to federal court under CAFA. Pet. App. 16a-17a. Liberty argued that petitioners' proposed addition of Liberty Fire's insureds to the class "commenced" a new action and that removal was therefore proper. *Id.* at 11a. The district court, per Judge Castillo, disagreed and remanded the case to state court. *Id.* at 10a.

Pursuant to 28 U.S.C. § 1453(c)(1), Liberty filed a petition for leave to appeal. The Seventh Circuit, per Judge Easterbrook, denied the petition. Pet. App. 9a-14a ("*Knudsen I*"). The court held that Liberty prematurely removed the case because the state judge had not yet "address[ed] the plaintiffs' latest proposal" to expand the class definition. *Id.* at 13a. However, the court recognized that "a new claim for relief (a new 'cause of action' in state practice), the addition of a new defendant, or any other step sufficiently distinct that courts would treat it as independent for limitations purposes, could well commence a new piece of litigation for federal purposes." *Id.* at 12a. The court further stated that the commencement of a new action might "lie[] in store," explaining that petitioners could not establish liability based on policies

issued by Liberty Fire under the existing complaint because Liberty Fire was "not a party to the suit" and because "Plaintiffs do not contend" that Liberty and Liberty Fire "are alter egos." *Id.* at 12a-13a. Therefore, the court concluded, if Liberty Fire "should be added as a defendant, it could enjoy a right to remove under [CAFA]. for suit *against it* would have been commenced after February 18, 2005." *Id.* at 14a.

E. The State Court Certified A Nationwide Class Expanded To Include All Lines Of Insurance Issued By Liberty And Thirty-Five Of Its Affiliates And Subsidiaries.

Emboldened by the remand approved in *Knudsen I*, petitioners went back to state court and, as the Seventh Circuit later noted, sought "*much* more relief." Pet. App. 3a. Petitioners asked the state court to certify a class expanded to include claimants who sought medical benefits under any policies issued by Liberty and *thirty-five* of its affiliates and subsidiaries. *Ibid.* Petitioners defined the following class:

> All insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries (collectively "Liberty Mutual"), their third party beneficiaries and their assignees who submitted medical bills covered by a Liberty Mutual insurance policy, and whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database.

C.A. App., Tab 18 at 2; see also *id.*, Tab 16 at 12-13. Contrary to petitioners' unsupported contention that the proposed class definition "include[d] only those claims of insureds of Liberty, its affiliates or subsidiaries *which Liberty adjusted*," Pet. 20, the proposed definition contained no such limitation. Rather, the proposed definition included "[a]ll insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries * * * whose claims were paid for less than the medi-

cal charge, based upon the application of a medical cost and utilization database"—regardless of who adjusted the claims. C.A. App., Tab 18 at 2.

Despite proposing a class that encompassed Liberty's affiliates and subsidiaries, petitioners did not add any of those affiliates or subsidiaries as defendants—an act that clearly would have permitted removal under *Knudsen I*. Pet. App. 14a (stating that if Liberty Fire "should be added as a defendant, it could enjoy a right to remove"). Instead, petitioners added new claims by asking "the state court to hold [Liberty] responsible for *all* policies issued by any subsidiary or affiliate." *Id.* at 3a. Moreover, petitioners "proposed that they be certified to represent a nationwide class, and that the court disregard any difference in insurance and workers' compensation laws across the 50 states" notwithstanding binding precedent "describing the grave problems with class actions for damages under multiple states' laws." *Id.* at 4a.

The state court certified the nationwide class proposed by petitioners on September 29, 2005, with a few modifications that are not pertinent here. Pet. App. 4a. The state court reasoned that allowing petitioners to "attempt to recover from Liberty on behalf of the insureds of [its] affiliates and subsidiaries" was necessary "to prevent Liberty from continuing to benefit from its improper discovery conduct." C.A. App., Tab 18 at 9. To hold otherwise, the court stated, would render the pre-certification "default against Liberty meaningless." *Ibid.*

As an additional justification for allowing petitioners to sue Liberty based on policies issued by its affiliates and subsidiaries, the state court credited petitioners' assertion that Liberty "and its affiliates filed one income tax return; there was one board of directors making the decision for investments for all companies; and Liberty provides the office space, the employees and the adjusting for all the companies." C.A. App., Tab 18 at 9. In fact, as the Seventh Circuit later recognized, Liberty "does *not* adjust all demands for

payment of all of its affiliates' policies." Pet. App. 6a (emphasis added). Indeed, the state court's class-certification order added claims based on policies issued and adjusted by some of Liberty's affiliates and subsidiaries before they even became affiliated with Liberty. Those claims include:

- claims under workers' compensation policies issued by Bridgefield Employers Insurance Company and Bridgefield Casualty Insurance Company and adjusted by their vendor from 1994 through 1997, before those companies became affiliated with Liberty in 1998 (C.A. App., Tab 22 at 1-2);
- claims under auto policies issued by Oregon Auto Insurance Company and North Pacific Insurance Company and adjusted by their vendor in 1998 and 1999, before those companies became affiliated with Liberty in 2002 (C.A. App., Tab 23 at 1-2); and
- claims under group health policies issued and adjusted by Employers Insurance Company of Wausau from 1985 to 1997, before it became affiliated with Liberty in 1998 (C.A. App., Tab 21 at 1-2).

At a hearing on the morning of October 14, 2005, Liberty informed the state court that it was going to remove the case later that day. At petitioners' request,[2] the state court immediately responded by issuing an order at the October 14 hearing that expanded its prior sanctions order to cover the entire

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[2] The Seventh Circuit later noted that petitioners asked that "all claims for payment by all insureds on all of these policies everywhere in the nation be covered by the default, so that [Liberty] would be compelled to pay without proof that an affiliate had failed to honor any policy." Pet. App. 3a. Petitioners contended that "[i]t should be enough * * * that an insurer disbursed less than the medical bill, regardless of any policy's actual terms." *Ibid.* As the Seventh Circuit recognized, acceptance of petitioners' position "would override co-payment requirements, caps on total indemnity, schedules of allowable fees, and many other common clauses." *Ibid.*

nationwide class on all claims, thereby denying Liberty a trial on the merits and ordering that the case "proceed with proof of damages" only. C.A. App., Tab 29. The state court thus parlayed its pre-certification sanctions order in what was then only an individual case involving "policies written by Liberty" into a class-wide finding of liability regarding policies issued and claims adjusted by thirty-five different insurers nationwide. The state court based this colossal class-action penalty on nothing more than petitioners' own error in failing to sue the company that was expressly named in the governing policies. Pet. App. 3a ("the plaintiffs have argued—and the state judge has held—that [Liberty] is liable because it did not do enough in discovery to alert plaintiffs' counsel to the need to substitute Liberty Fire as a defendant * * * despite the fact that only Liberty Fire's name is on the policies").

F. The Seventh Circuit Upheld Liberty's Second Removal.

On the afternoon of October 14, 2005, Liberty removed this case for a second time. C.A. App., Tabs 30-32. Liberty argued that removal was proper for two reasons. First, the class-certification order added new claims that do not relate back to petitioners' pre-CAFA pleadings and thus commenced a new action. *Id.*, Tab 32 at 3-18. Second, the class-certification order added claims based on group health policies issued by two Liberty affiliates that are completely preempted by ERISA. *Id.* at 18-19. The district court, per Judge Castillo, rejected both bases for removal and granted petitioners' motion to remand. Pet. App. 15a-26a.

In a unanimous opinion authored by Judge Easterbrook and joined by Judges Coffey and Manion, the Seventh Circuit granted Liberty's petition for leave to appeal and vacated the remand order. Pet. App. 1a-8a ("*Knudsen II*"). The court held that CAFA's substantive requirements were satisfied because "[t]he stakes exceed $5 million; more than two-thirds of the class members live outside Illinois; [and] mini-

mal diversity is established." *Id.* at 7a. The court then applied Illinois law in holding that the state court's class-certification order commenced a new action by adding new claims that do not relate back to petitioners' pre-CAFA pleadings. *Id.* at 5a.

In so holding, the Seventh Circuit explained that "[w]hat causes the class definition of September 2005 to initiate new claims is the fact that [Liberty] does not adjust all demands for payment of all of its affiliates' policies." Pet. App. 6a. The court provided two examples to prove its point. First, "Liberty Northwest Corporation, one of [Liberty's] affiliates, has adjusted claims against its own policies since 1996 using its own cost-and-utilization software." *Ibid.* The court noted that "[t]he complaint initially filed in this case could not have notified [Liberty] that plaintiffs contested any decision made by Liberty Northwest—nor did the complaint allege that [Liberty] and Liberty Northwest are alter egos." *Ibid.* Petitioners thus did not place Liberty "on notice of this claim for relief before February 18, 2005." *Ibid.*

Second, the Seventh Circuit noted that Employers Insurance of Wausau ("Wausau") "has employed a 'medical cost and utilization database' since 1985," long before it became affiliated with Liberty in 1998. Pet. App. 6a. Therefore, "the class includes all insureds (and their assignees) whose claims were adjusted by Wausau using its own data and methods back to 1985." *Ibid.* The court concluded that petitioners' pre-CAFA pleadings "did not even hint that [Liberty] might be accountable for underpayments on the Wausau policies, claims against which had been adjusted as long as 15 years earlier under a distinct system. Any effort to recover on account of these policies is a distinct claim for relief." *Id.* at 7a.

Emphasizing the narrow scope of its opinion, the Seventh Circuit explained that "a complaint alleging that [Liberty] mishandled its 'medical cost and utilization database' when adjusting demands for payment of medical bills would be one claim, whether [Liberty] or Liberty Fire had issued the pol-

icy." Pet. App. 5a. The court reasoned that "the grievance concerns the way that a particular 'medical cost and utilization database' works, and the number of different policies or issuers to which a single database and software package applies would be a detail, as long as [Liberty] itself did the adjustment work." *Id.* at 5a-6a. However, because the state court's class-certification order here added claims based on policies adjusted by others, "litigation has been commenced within the Act's coverage period," making removal proper under CAFA. *Id.* at 7a.

The Seventh Circuit denied petitioners' request for rehearing en banc, with no judge dissenting. Pet. App. 27a. The Bakers subsequently dismissed their individual claims with prejudice.

REASONS FOR DENYING THE PETITION

There is no reason for this Court to review the Seventh Circuit's decision. First, there is no conflict among the courts of appeals. Petitioners cite a few district court decisions in trying to manufacture conflicts among the lower courts concerning whether (and under what circumstances) post-CAFA conduct can commence a new action. But petitioners concede that courts must look to the law of the forum state in deciding whether post-CAFA conduct commences a new action and thus permits removal of a pre-CAFA case. Pet. 26. As a result, there can be no true conflict among the lower courts because decisions necessarily turn on the substance of varying state laws. In addition, all four courts of appeals that have considered the issue have agreed that post-CAFA conduct can commence a new action, with not a single appellate judge dissenting from that conclusion. What is more, the district court cases relied upon by petitioners have been overruled by subsequent decisions from the courts of appeals. In short, there is no conflict and no reason to believe that another court of appeals faced with similar facts would come out any differently than the court below.

Second, this case does not raise issues of sufficient importance to warrant this Court's review. In the first place, this Court does not sit to review decisions that—like the decision below—are based on the application of state law. Moreover, the Seventh Circuit's decision is of diminishing precedential importance because the number of pre-CAFA class actions that remain pending today is small and decreasing. Beyond this, the Seventh Circuit's decision provides only a narrow opening for defendants to remove pre-CAFA cases, with that court rejecting every other attempt to do so. The Seventh Circuit's decision is also of little precedential importance because the decision turned on highly unusual facts that are unlikely to recur: Petitioners took a pre-CAFA putative class that was limited to individuals covered by casualty policies issued by Liberty and turned it into a nationwide class action default judgment holding Liberty liable to individuals covered by all lines of insurance issued by not only Liberty but also thirty-five of its affiliates and subsidiaries. Thus, the Seventh Circuit's fact-bound decision is case-specific and inappropriate for this Court's review.

Finally, the Seventh Circuit's decision is plainly correct. Petitioners' position that post-CAFA conduct can never commence a new action lacks any support in either CAFA or its legislative history. To the contrary, petitioners' position would frustrate congressional intent by allowing plaintiffs to fundamentally transform pre-CAFA cases into class actions that bear little or no resemblance to the original pleadings. Moreover, the Seventh Circuit was clearly correct in holding that the state court's class-certification order added new claims that do not relate back to petitioners' pre-CAFA pleadings under Illinois law. The class-certification order added claims based on all lines of insurance issued and adjusted by thirty-five of Liberty's affiliates and subsidiaries. Petitioners' pre-CAFA pleadings—which were limited to claims based on casualty policies issued by Liberty and failed to even mention any of Liberty's affiliates and subsidiaries—plainly did not provide Liberty with notice that petitioners

would later seek to hold Liberty liable for the conduct of its affiliates and subsidiaries. Therefore, the state court's class-certification order commenced a new action under Illinois law and permitted Liberty to remove this case under CAFA.

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH A DECISION FROM ANY OTHER COURT OF APPEALS.

According to petitioners, the lower courts have created two separate conflicts in deciding whether, and under what circumstances, post-CAFA conduct commences a new action in suits originally filed before CAFA's effective date. Pet. 23-24. First, petitioners contend that there is a conflict among the lower courts about whether post-CAFA conduct can ever commence a new action under CAFA. *Id.* at 23. Second, petitioners argue that the lower courts are divided as to whether the relation-back doctrine should be employed when deciding if the post-CAFA addition of a new defendant commences a new action. *Id.* at 24. In fact, the Seventh Circuit's decision does not conflict with a decision from any other court of appeals.

A. The Alleged Conflicts Are Entirely Illusory Because Courts Must Apply Differing State Laws To Determine Whether Post-CAFA Conduct Commences A New Action.

Petitioners concede that "[w]hether an action has been commenced here is governed by Illinois law." Pet. 26. Petitioners are correct to concede the point. CAFA does not define the term "commenced." Nor is there any federal statutory standard for determining the date that an action commences in state court. Therefore, federal courts necessarily must look to the law of the forum state to determine when a state court action commenced.

As the Fifth Circuit recently noted, "the courts of appeals that have examined the issue have unanimously held that when a lawsuit is initially 'commenced' for purposes of

CAFA is determined by state law." *Braud* v. *Transp. Serv. Co.*, 445 F.3d 801, 803 (5th Cir. 2006) (citing *Plubell* v. *Merck & Co.*, 434 F.3d 1070, 1071-1072 (8th Cir. 2006); *Bush* v. *Cheaptickets, Inc.*, 425 F.3d 683, 689 (9th Cir. 2005); *Natale* v. *Pfizer, Inc.*, 424 F.3d 43, 44 (1st Cir. 2005); *Pritchett* v. *Office Depot, Inc.*, 420 F.3d 1090 (10th Cir. 2005); *Knudsen I*, 411 F.3d 805 (7th Cir.)). The *Braud* court explained that "CAFA broadens diversity jurisdiction for certain qualifying class actions and authorizes their removal, and thus, 'given its context, CAFA's "commenced" language surely refers to when the action was originally commenced in state court.'" *Ibid.* "Furthermore, when an action is commenced in state court is determined based on the state's own rules of procedure." *Ibid.* (citing *Pace* v. *DiGuglielmo*, 544 U.S. 408, 415 (2005) (looking to state law to determine when a pleading has been "properly filed" for purposes of a federal time limit); *Herb* v. *Pitcairn*, 324 U.S. 117, 120 (1945) ("Whether any case is pending in the Illinois courts is a question to be determined by Illinois law.")); see also *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 751 (1980) (state law determines when an action commences for statute of limitations purposes).

Similarly, all of the circuits that have addressed the question have concluded that courts must apply the forum state's relation-back doctrine in deciding whether post-CAFA conduct commences a new action. *Phillips* v. *Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006); *Plubell*, 434 F.3d at 1071-1074 (8th Cir.); see also *Prime Care, LLC* v. *Humana Ins. Co.*, 447 F.3d 1284, 1286 (10th Cir. 2006) (courts "generally agree that whether an amendment is distinct enough to give rise to a new commencement date is properly gauged by the forum state's law governing the relation-back of pleading amendments"). That conclusion is consistent with the uniform practice in the courts of appeals to rely on the forum state's relation-back law in determining the timeliness of amended pleadings that were filed in state court before removal. *Pac. Employers Ins. Co.* v. *Sav-A-Lot*, 291 F.3d 392,

400 (6th Cir. 2002) ("it is the version of the relation-back doctrine embodied in the Kentucky Rules, and not the version embodied in the Federal Rules, that governed the consequences of the filing of the amended complaint" in state court before removal); *Anderson* v. *Allstate Ins. Co.*, 630 F.2d 677, 682 (9th Cir. 1980) (state law governed whether the amended complaint related back "because the relevant amendments and service of process preceded removal to federal court").

Every state has an elaborate body of law defining when an action commences and when amendments relate back to timely pleadings. Like the federal rule, Fed. R. Civ. P. 3, many states measure "commencement" by the date the complaint is filed. But "some states may deem [an action] commenced when the filing fee is paid, or when the clerk finds the complaint procedurally sufficient * * * , or when the first (or last) defendant is served with process." *Schorsch* v. *Hewlett-Packard Co.*, 417 F.3d 748, 750 (7th Cir. 2005). Similarly, the lower courts have applied a wide array of state laws in determining whether post-CAFA conduct relates back to pre-CAFA pleadings. *E.g.*, *Cuesta* v. *Ford Motor Co.*, 2006 WL 1207608, at *3-4 (E.D. Okla. May 1, 2006) (Oklahoma law); *Whitehead* v. *Nautilus Group, Inc.*, 428 F. Supp. 2d 923, 926-928 (W.D. Ark. 2006) (Arkansas law); *Adams* v. *Ins. Co. of N. Am.*, 426 F. Supp. 2d 356, 372-377 (S.D. W. Va. 2006) (West Virginia law). Therefore, lower court decisions addressing when actions commence in state court and whether post-CAFA amendments filed in state court relate back to pre-CAFA pleadings necessarily turn on the substance of the varying laws of the forum state. As a result, there can be no true conflict among the lower courts because courts must apply the laws of different states to determine whether post-CAFA conduct commenced a new action.

B. The Courts Of Appeals Uniformly Hold That Post-CAFA Conduct Can Commence A New Action.

Petitioners cite a few stray decisions from *district courts* in the Eighth and Tenth Circuits in arguing that the lower courts are divided concerning whether post-CAFA conduct can commence a new actior in a case originally filed before CAFA's effective date. Pet. 23 (citing *Hot Spring County Solid Waste Auth.* v. *UnitedHealth Group*, 2006 WL 376545 (W.D. Ark. Jan. 13, 2006); *Comes* v. *Microsoft Corp.*, 403 F. Supp. 2d 897 (S.D. Iowa 2005); *Weekley* v. *Guidant Corp.*, 392 F. Supp. 2d 1066 (E.D. Ark. 2005)); see also Pet. 26 (citing *Plummer* v. *Farmers Group, Inc.*, 388 F. Supp. 2d 1310 (E.D. Okla. 2005)). In *Hot Spring* and *Comes*, the district judges relied on *Weekley* in stating that post-CAFA conduct can never commence a new case. *Hot Spring County Solid Waste Auth.*, 2006 WL 376545, at *2; *Comes*, 403 F. Supp. 2d at 903; *Weekley*, 392 F. Supp. 2d at 1067-1069. And in *Plummer*, the district court used a relation-back analysis in holding that a post-CAFA amended complaint commenced a new action, but stated in dicta that it "would prefer a bright line test: *i.e.*, that a claim is commenced with the filing of the original complaint." 388 F. Supp. 2d at 1314-1317.

However, all four courts of appeals that have considered the question—including the Seventh Circuit's decision below—have rejected the position stated in the district court cases cited by petitioners and have instead held that post-CAFA conduct can commence a new action. *Knudsen II*, Pet. App. 7a (7th Cir.) ("a novel claim tacked on to an existing case commences new litigation for purposes of the Class Action Fairness Act"); *Prime Care*, 447 F.3d at 1289 (10th Cir.) ("we hold that whether a post-CAFA amendment triggers a substantive right of removal under CAFA by the affected parties depends on whether the amendment relates back to the pre-CAFA pleading that is being amended"); *Braud*, 445 F.3d at 804 (5th Cir.) (post-CAFA "amendments that add a defendant 'commence' the civil action as to the

added party"); *Plubell*, 434 F.3d at 1071 (8th Cir.) (propriety of removal based on a post-CAFA amended complaint depends on "whether the amendment relates back or is instead a new action").

Moreover, the district court decisions relied upon by petitioners are no longer good law even within their own circuits. In *Plubell*, the Eighth Circuit overruled the prior decisions in *Hot Spring*, *Comes*, and *Weekley* by holding that post-CAFA conduct can commence a new action if the conduct does not relate back to the plaintiff's pre-CAFA pleadings. 434 F.3d at 1071; see also *Braud*, 445 F.3d at 804 n.7 (*Weekley* "has been rejected by implication by the circuit court from that jurisdiction"). Indeed, post-*Plubell* decisions issued by district courts in the Eighth Circuit have used a relation-back test to determine whether post-CAFA conduct commenced a new action. *E.g.*, *Whitehead*, 428 F. Supp. 2d at 926-928; *Berry* v. *Volkswagen of Am., Inc.*, 2006 WL 344774, at *1 (W.D. Mo. Feb. 15, 2006). In addition, the Tenth Circuit has rejected the *Plummer* dicta by holding that post-CAFA conduct can commence a new action. *Prime Care*, 447 F.3d at 1289.

It is no surprise that, like the Seventh Circuit in this case, the overwhelming majority of district courts to have addressed the question have used a relation-back analysis to determine whether post-CAFA conduct commenced a new action, rather than the absolutist position adopted in cases like *Weekley*.[3] Therefore, the overruled district court deci-

[3] *E.g.*, *Briggs* v. *GEICO Gen. Ins. Co.*, 2006 WL 1897210, at *1-2 (D. Colo. July 10, 2006); *In re Audi Litig.*, 2006 WL 1543752, at *2-6 (N.D. Ill. June 1, 2006); *Cuesta*, 2006 WL 1207608, at *3-4; *Whitehead*, 428 F. Supp. 2d at 926-928; *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 2006 WL 1004725, at *4, *6 (S.D.N.Y. Apr. 17, 2006); *Adams*, 426 F. Supp. 2d at 372-381; *Carpanelli* v. *Am. Standard Cos.*, 2006 WL 568307, at *2-5 (N.D. Cal. Mar. 3, 2006); *Berry*, 2006 WL 344774, at *1; *Werner* v. *KPMG LLP*, 415 F. Supp. 2d 688, 704-710 (S.D. Tex. 2006); *Eufaula Drugs, Inc.* v. *ScripSolutions*, 2005 WL 2465746, at *3-5

sions relied upon by petitioners are of no continuing significance.

In addition, the district court decisions relied upon by petitioners are easily distinguishable from this case on their facts. In *Hot Spring*, the defendant based removal solely on the post-CAFA addition of two of the plaintiff's employees as class representatives. 2006 WL 376545, at *1. In *Comes*, the defendant based removal on the post-CAFA addition of factual allegations in support of claims that the plaintiffs had already alleged in pre-CAFA pleadings. 403 F. Supp. 2d at 902-904. And in *Weekley*, the defendant based removal on a one-sentence document filed after CAFA's enactment that added class allegations and sought to hold the defendant liable for its manufacture of cardiac devices in addition to the pacemaker that formed the basis for the pre-CAFA complaint. 392 F. Supp. 2d at 1066. Thus, none of the post-CAFA conduct that took place in the cases relied upon by petitioners comes close to what occurred here, where the state court took a pre-CAFA putative class of individuals covered by casualty policies issued by Liberty and turned it into a nationwide class action default judgment holding Liberty liable to all persons covered by any type of policy issued by Liberty and thirty-five of its affiliates and subsidiaries. There is simply no reason to believe that *any* court would decide *this* case differently than the Seventh Circuit.

C. This Case Does Not Present The Second Conflict Alleged By Petitioners.

Petitioners contend that the courts of appeals are divided concerning whether to use a relation-back analysis in deciding if the post-CAFA addition of a new defendant commences a new case. Pet. 23-24. But the Seventh Circuit based its decision on the post-CAFA "addition of new claims," not new defendants. Pet. App. 7a. The Seventh

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(M.D. Ala. Oct. 6, 2005); *Heaphy* v. *State Farm Mut. Auto. Ins. Co.*, 2005 WL 1950244, at *3-5 (W.D. Wash. Aug. 15, 2005).

Circuit had no occasion to address the addition of new defendants because petitioners did not add any new defendants; Liberty remains the lone defendant in this case. Petitioners' request that the Court reach out to resolve an alleged conflict untethered to the facts of this case should be rejected.

II. THE PETITION DOES NOT RAISE ANY IMPORTANT QUESTION WARRANTING RESOLUTION BY THIS COURT.

Even if there were a conflict among the lower courts on any of the issues raised by petitioners—and there is not—there are a number of reasons why this case is not appropriate for this Court's review. First, as petitioners concede and as we discuss above, the question whether (and under what circumstances) post-CAFA conduct commences a new action depends on the forum state's law. Pet. 26; Section I.A, *supra*. Petitioners' position thus amounts to a claim that the Seventh Circuit misapplied Illinois law. This Court does not grant certiorari to review applications of state law. Sup. Ct. R. 10.

Second, the question whether (and under what circumstances) post-CAFA conduct commences a new action is of diminishing importance. CAFA is now almost eighteen months old. There are only a limited number of class actions filed before CAFA's enactment that remain pending today—and that number decreases by the day. Therefore, a decision addressing the removal of pre-CAFA class actions would affect only a small and shrinking number of cases.

Third, contrary to petitioners' implication that the Seventh Circuit's decision opened floodgates, in reality it provides a very narrow opening for the removal of pre-CAFA cases. Indeed, the Seventh Circuit has rejected the removal of pre-CAFA cases in every other opinion it has issued, explaining that "a routine amendment to the complaint does not commence a new suit." *Schorsch*, 417 F.3d at 749; see *Natale* v. *Gen. Motors Corp.*, 2006 WL 1458585, at *2 (7th Cir.

May 8, 2006); *Phillips*, 435 F.3d at 787-788; *Schillinger* v. *Union Pac. R.R. Co.*, 425 F.3d 330, 334 (7th Cir. 2005); *Pfizer, Inc.* v. *Lott*, 417 F.3d 725, 726 (7th Cir. 2005). In *Schillinger*, for example, the Seventh Circuit held that removal of a pre-CAFA case was improper even though the plaintiffs filed a post-CAFA amended complaint that expanded the class from Illinois landowners to include landowners nationwide. 425 F.3d at 334. And in *Schorsch*, the court held that removal of a pre-CAFA case was improper even though the plaintiff's post-CAFA amended complaint expanded the proposed class from consumers of one printer product manufactured by the defendant to include consumers of two other printer products that the defendant manufactured. 417 F.3d at 750-751. Reported decisions from district judges in the Seventh Circuit have followed that court's lead, rejecting every removal of pre-CAFA cases with just one exception.[4] Therefore, the decision below has not opened the door to removal of pre-CAFA cases. Rather, the Seventh Circuit's decision is merely the rare exception that proves the general rule: the removal of cases initially filed before CAFA is not permitted absent extraordinary circumstances.

Fourth, the decision below is fact-bound. The Seventh Circuit carefully distinguished its prior decisions in *Schillinger* and *Schorsch* based on the extraordinary facts presented by this case. Pet. App. 5a-7a. Petitioners' own arguments for reversal demonstrate the fact-bound nature of the decision

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[4] *In re Audi Litig.*, 2006 WL 1543752, at *6 (N.D. Ill. June 1, 2006); *In re Sears, Roebuck & Co.*, 2006 WL 1517779, at *4 (N.D. Ill. May 24, 2006); *Miller* v. *Hypoguard USA, Inc.*, 2006 WL 1285343, at *7 (S.D. Ill. May 8, 2006); *Bemis* v. *Allied Property & Cas. Ins. Co.*, 2006 WL 1064067, at *6 (S.D. Ill. Apr. 20, 2006); *Komeshak* v. *Concentra, Inc.*, 2005 WL 2488431, at *2-3 (S.D. Ill. Oct. 7, 2005); *Alsup* v. *3-Day Blinds*, 2005 WL 2094745, at *2-3 (S.D. Ill. Aug. 25, 2005); *Smith* v. *Pfizer, Inc.*, 2005 WL 3618319, at *5 (S.D. Ill. Mar. 24, 2005). Compare *Schillinger* v. *360Networks USA, Inc.*, 2006 WL 1388876, at *4-6 (S.D. Ill. May 18, 2006) (removal was proper because post-CAFA addition of new defendant did not relate back to pre-CAFA pleadings).

below. Petitioners contend, for example, that the Seventh Circuit erred by finding that the class certified by the state court included claims adjusted by Liberty's affiliates and subsidiaries. Pet. 25. But even if petitioners were correct—and they are not—petitioners' position amounts to little more than a claim that the Seventh Circuit made erroneous factual determinations. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings").

Petitioners fail to address any of the foregoing reasons showing why this case is unworthy of this Court's review. Instead, petitioners suggest only that this case merits review because the Seventh Circuit's decision is "disruptive of federal-state comity." Pet. 29. That is clearly incorrect. In enacting CAFA, Congress resolved the question of "federal-state comity" in favor of removal by providing for federal jurisdiction over putative class actions like this case. 28 U.S.C. § 1453(b); see also 28 U.S.C. § 1332(d). Petitioners offer no reason why this Court should disturb Congress's considered policy judgment.

III. THE SEVENTH CIRCUIT'S DECISION IS PLAINLY CORRECT.

The decision below is consistent with CAFA, Illinois law, and common sense. First, the Seventh Circuit was clearly correct in holding that post-CAFA conduct can commence a new action. As the Tenth Circuit explained, "the unqualified disregard of any post-CAFA pleading amendments * * * entails the practically untenable result that once a pre-CAFA case is filed, the plaintiff can tack on new causes of action so substantively independent of the original case that they would be properly treated as filed after CAFA's effective date for all legal purposes controlled by Rule 15(c) *except for CAFA*." *Prime Care*, 447 F.3d at 1288 n.4. Nothing in CAFA or its legislative history requires such an absurd result. Petitioners' argument (Pet. 26) that "a claim is 'com-

menced' for purposes of CAFA only with the filing of the original complaint" is therefore without merit.[5]

Second, the Seventh Circuit was plainly correct in finding that the state court's class-certification order dramatically changed the case by adding new claims based on policies issued and adjusted by Liberty's affiliates and subsidiaries. Contrary to petitioners' contention that the new post-CAFA class definition was limited to claims adjusted by Liberty, Pet. 25, in reality the class definition expressly included "[a]ll insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries * * * whose claims were paid for less than the medical charge, based upon the application of a medical cost and utilization database." C.A. App., Tab 18 at 2; see also *id.*, Tab 16 at 12-13. If petitioners' contention were correct, then the class definition would read "[a]ll insureds of Liberty Mutual Insurance Company, its affiliates and subsidiaries * * * whose claims were [*adjusted by Liberty Mutual Insurance Company and were*] paid for less than the medical charge, based upon [*Liberty Mutual Insurance Company's*] application of a medical cost and utilization database." The class definition adopted by the state court, however, contained no such limitations.

Petitioners suggest that if the Seventh Circuit "had any doubts on this score," it should have asked the state court to "issue a ruling on whether the amended class included those claims made by insureds of Liberty, its affiliates and subsidiaries which Liberty did *not* adjust." Pet. 25-26. But there could be no "doubts on this score" because the plain language of the class definition clearly encompassed claims adjusted by Liberty's affiliates and subsidiaries. Moreover, a

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[5] In fact, petitioners waived the argument that post-CAFA conduct can never commence a new action by failing to raise the argument to the panel below. *E.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001) (issue waived "because it was not raised or briefed below"); see also *Hoover* v. *Ronwin*, 466 U.S. 558, 574 (1984) (refusing to consider argument made "for the first time in [a] motion for rehearing in the Court of Appeals")

federal court faced with a removal petition has only two options: remand or accept jurisdiction. Petitioners cite no authority suggesting that there is a third option that allows federal courts to certify questions to state courts in order to determine the propriety of the removal. To the contrary, this Court has long held that "events occurring subsequent to removal" are irrelevant in deciding whether federal jurisdiction exists. *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 293 (1938). Thus, petitioners' suggestion that the Seventh Circuit should have asked the state court whether the class definition included claims based on policies adjusted by Liberty's affiliates and subsidiaries—a suggestion that petitioners never made in the Seventh Circuit—is wholly without merit.

Third, the Seventh Circuit correctly held that the new claims added by the class-certification order do not relate back to petitioners' pre-CAFA pleadings. Illinois law provides that an amended pleading relates back to a timely pleading when "the cause of action asserted * * * in the amended pleading grew out of the same transaction or occurrence set up in the original pleading." 735 ILCS 5/2-616(b). Thus, an amended pleading relates back when the original complaint "furnished to the defendant all the information necessary for him to prepare a defense to the claim subsequently asserted in the amended complaint." *Boatmen's Nat'l Bank* v. *Direct Lines, Inc.*, 656 N.E.2d 1101, 1107 (Ill. 1995).

Petitioners' pre-CAFA pleadings did not even come close to providing Liberty with "all the information necessary" to defend against the claims added by the state court's class-certification order. Petitioners limited their pre-CAFA pleadings to claims based on casualty policies issued by Liberty alone. C.A. App., Tab 2 ¶ 11. Petitioners thus failed to provide Liberty with notice that they would later seek to hold Liberty liable for the conduct of its affiliates and subsidiaries,

none of which were even mentioned in petitioners' pre-CAFA pleadings.

To take just one example, the class-certification order added claims based on policies issued by Wausau, an affiliate of Liberty. Pet. App. 6a. Wausau adjusted claims under its own policies using its own medical cost and utilization database since 1985, long before it became affiliated with Liberty in 1998. *Ibid.* As the Seventh Circuit correctly held, petitioners' pre-CAFA pleadings "did not even hint that [Liberty] might be accountable for underpayments on the Wausau policies." *Id.* at 7a. Furthermore, as *Knudsen I* noted, petitioners' pre-CAFA pleadings "had not made an alter-ego or veil-piercing argument." *Id.* at 6a. Although petitioners apparently "changed their tune" following the remand from *Knudsen I*, *ibid.*, Illinois law provides that "where one complaint alleges liability predicated upon defendant's own actions and the other complaint alleges defendant to be liable for the actions of, or an incident caused by, another, the amended complaint is unlikely to relate back to the original one." *Kennedy* v. *King*, 623 N.E.2d 955, 958 (Ill. App. Ct. 1993). Accordingly, the Seventh Circuit correctly held that the class-certification order's addition of claims seeking to hold Liberty liable for the conduct of its affiliates and subsidiaries does not relate back to petitioners' pre-CAFA pleadings under Illinois law.[6]

Petitioners advance three principal arguments in contending that the post-CAFA claims added by the state court's class-certification order relate back to petitioners' pre-CAFA pleadings, none of which has any merit. First, petitioners contend that the state court's massive expansion of the putative class was "routine" and justified by the default judgment entered against Liberty. Pet. 27. As an initial matter, the

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[6] The result would be the same under federal law because Illinois' relation-back rule is "functionally identical" to Fed. R. Civ. P. 15(c). *Schorsch*, 417 F.3d at 751.

state court's addition of claims based on all lines of insurance issued and adjusted by Liberty and thirty-five of its affiliates and subsidiaries can hardly be described as "routine." Indeed, if Liberty could not remove this case under CAFA, then it is difficult to imagine *any* pre-CAFA case that could be removed. Moreover, there is nothing routine about a massive class-certification based on a default judgment. To the contrary, the courts of appeals agree that a default judgment may not be used to certify a class action. *E.g.*, *Partington* v. *Am. Int'l Specialty Lines Ins. Co.*, 443 F.3d 334, 341 (4th Cir. 2006); *Davis* v. *Hutchins*, 321 F.3d 641, 648-649 (7th Cir. 2003).

Second, petitioners argue that "Illinois law entitled the petitioners to correct by amendment the misnomer of the petitioners' class * * * without the amendment kicking off a new action for purposes of CAFA." Pet. 27-28. But petitioners have long known that Liberty Fire—not Liberty—issued the policies underlying their claims. Petitioners thus had ample opportunity to add Liberty Fire as a defendant or amend their complaint to allege that Liberty is liable for Liberty Fire's conduct on an alter ego theory. And even if petitioners were confused about Liberty Fire's role in this case, that would not explain the class-certification order's addition of claims based on policies issued by thirty-four of Liberty's other affiliates and subsidiaries. Petitioners' "misnomer" contention is thus plainly incorrect.

Finally, petitioners' suggestion (Pet. 28) that their position is "most consistent" with *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), is completely baseless. In *American Pipe*, this Court held that the commencement of a putative class action tolls the statute of limitations on individual class members' claims. *Id.* at 552. The Seventh Circuit's decision will not result in any putative class member losing a right to proceed based on a statute of limitations. In fact, petitioners' reliance on *American Pipe* betrays a fundamental misconception about the Seventh Circuit's use of the

relation-back doctrine to determine whether the state court's class-certification order commenced a new action. In deciding whether post-CAFA conduct commences a new action, "courts do not apply relation-back rules because the CAFA issue turns on a limitations bar or because limitations has any role in the analysis." *Werner* v. *KPMG LLP*, 415 F. Supp. 2d 688, 700 (S.D. Tex. 2006). "Rather, the relation-back concept is applied as an analytic tool, a way of determining whether amended pleadings so change the claims or parties as to be a new civil action, rather than a 'workaday change' that continues a pending action." *Ibid.* Therefore, neither *American Pipe* nor the statute of limitations has any relevance to this case. Petitioners will be fully able to pursue their claims in the forum that Congress designated: the United States District Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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